111-329

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 243.

WILLIAM IRVINE, APPELLANT,

vs.

SUMNER T. DUNHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED APRIL 30, 1881.

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1 In the District Court of the Nineteenth Judicial District of of the State of California, within and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,

vs.

WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

Bill of Complaint.

The above-named plaintiff complains of the above-named defendants, and for cause of action avers that heretofore, to wit, on the 28th day of March, A. D. 1874, the defendant, William Irvine, and Richard H. Sinton, of said city and county, were joint and equal owners of the one undivided half of that certain gold-bearing quartz lode and mine located on Carson Hill, in the county of Calaveras,
2 in said State of California, familiarly known as and called the "Morgan Mine;" that the legal title to said undivided one half of said mine and mining property had been theretofore taken and then stood in the name of said defendant Irvine, but had been so taken, and was on the date aforesaid held by said Irvine in trust for himself and said Sinton equally and share and share alike; that said interest in said mining property had been and was acquired by said Irvine and Sinton by their mutual efforts, at their mutual expense, and for their common and equal benefit, and by, upon, and pursuant to an agreement between them to acquire the title thereto, and to sell or otherwise dispose of the same, and to equally share the profits and losses arising thereupon, and that the other undivided half of said mining property was as plaintiff avers, on information and belief, then and there held by said Irvine
3 in trust for divers other persons.

II.

That upon the said 28th day of March, A. D. 1874, the said defendant Irvine and said Sinton made and entered into an agreement in reference to said undivided half of said mining property so owned by them equally, and so held in the name of said Irvine, but in trust for their common use and benefit as aforesaid by which the said Irvine agreed to hold said undivided one-half of said mining property equally for himself and said Sinton, share and share alike, and promised and bound himself whenever said mining property should be sold or otherwise disposed of by him to account fully and truly to said Suiton, his heirs or assigns, for the one-half of all net proceeds of such sale or other disposition of said one-half interest; and it was then and there further agreed between said de-
4 fendant Irvine and said Sinton that all necessary expenses, including counsel fees, theretofore incurred, or that might thereafter be incurred in and about the property up to the time of such sale or other disposition thereof, should be first paid out of the

proceeds of such sale or other disposition before division of the proceeds.

And the said defendant Irvine thereupon upon said 28th day of March, A. D. 1874, made and executed to said Sinton his certain instrument and declaration of trust in writing, a copy of which is hereunto annexed, marked Exhibit A, and made part of this complaint.

III.

And the plaintiff avers that thereafter, to wit, on the 8th day of September, A. D. 1874, the said Sinton duly assigned, transferred, and conveyed to one George P. Thrie, all his right, title, and interest in said mining property, and all his right, title, and in-
5 terest in and to the said declaration of trust, and everything coming or that might come to him under or by virtue thereof.

IV.

And the plaintiff avers that afterwards, to wit, upon the 17th day of March, A. D. 1875, the said Irvine, and the owners of the other undivided half of said mining property, formed themselves into a corporation under the laws of the State of California, called the Morgan Mining Company, being the corporation defendant herein; that the purposes for which said corporation was formed were, as declared in its articles and certificate of incorporation, "to sell or work and develop that mining property in the county of Calaveras, State of California, formerly known as the Carson Hill or Morgan Mine, it being the same property conveyed to William Irvine by letters patent of the United States, bearing date March ninth, A. D. eighteen hundred and seventy-four, recorded in the office of the county
6 recorder of the said county of Calaveras in book W of deeds, at pp. 544, 555, 556, 557, 558, and 559.

"And for this purpose, to purchase adjacent lodes, construct, buy, and sell mills, water-rights, and mill-sights, flumes, timber-lands; to reduce ores and to buy and sell the same, and to do all other things that may be necessary and proper in or about the selling or developing of said property."

That its principal place of business is the said city and county of San Francisco, and its time of existence is to be fifty years after said 12th day of March, 1875.

And plaintiff avers that said corporation then and there duly organized, and still continues in existence.

And the plaintiff avers that aftes the organization of said corporation, defendant as aforesaid, to wit, on the 9th April, 1875, the said defendant Irvine and the other owners of said mining property, except said Thrie, disposed of the said mining property to
7 said corporation, defendant by selling and conveying the same to said corporation, in consideration of certain shares in the capital stock of said company, and that said corporation duly

issued to said owners the number of shares proportioned to their interests in said mining property, and that said defendant Irvine received from said corporation ten thousand shares of said capital stock as the consideration coming to him as the holder of the undivided one-half of said mining property, being the one-half held by him in trust for himself and said Thrie, as the grantee and assignee of said Sinton, and that said Thrie then and there became entitled to the one-half af said last-named shares of said stock—that is to say, five thousand shares—subject, however, to the payment by him of his just share of the expenses referred to in the said Exhibit A, herewith annexed.

8

V.

And the plaintiff avers that afterwards, to wit, on the 29th day of June, 1875, the said Thrie duly conveyed, transferred, and assigned to the plaintiff all his right, title, and interest in and to the said mining property and said shares of the capital stock aforesaid, and the plaintiff has now become vested with all the rights and interests which by reason of the premises formerly appertained and belonged to said Sinton, and that said defendant Irvine is now the trustee of the plaintiff, and holds for the use and benefit of this plaintiff the said shares of the capital stock of said corporation to the extent of five thousand shares, subject to the payment of the necessary expenses refeerred to in said Exhibit A.

VI.

And the plaintiff avers that after the said 29th day of June, 1875, he applied to the said defendant Irvine for an account of all

9

necessary expenses, including counsel fees, incurred by him before, on, and after the said 28th day of March, A. D. 1874, in and about said mining property up to the time of the disposition of the same to said corporation, and has offered to pay to said defendant Irvine the one-half thereof, and did then and there demand that said defendant Irvine should assign and transfer to the plaintiff the said last-named number of shares of stock of said corporation so as aforesaid held by him, but that said defendant Irvine wholly refused to make or render to this plaintiff any account in the premises, and wholly denies the rights of the plaintiff in the premises, and denies his said trust, and refuses in any manner and without just cause to recognize this plaintiff as having any interest in the premises, and claims to own and hold for his own exclusive

10

use the whole of said shares so as aforesaid transferred to him, and denies that he ever was trusted in the premises for said Sinton or said Thrie or this plaintiff of any of the matters aforesaid or at all.

And the plaintiff avers that he is now ready and anxious to enter into an accounting with the said defendant Irving, of and concerning all necessary expenses, including counsel fees, at any time incurred or paid by said defendant Irvine in or about the property

aforesaid, up to the time of said sale or disposition of the same to said corporation, and offers to pay into court the one-half part of all such expenses, and all further or other sums that this honorable court may [deem] just and equitable or proper or may at any time order or decree.

VII.

And the plaintiff further avers that *that* he is informed and believes that with the said number of shares so transferred to
11 said defendant Irvine, the one-half of which is held as aforesaid in trust for the plaintiff, said defendant Irvine, with others acting in concert with him, represents and claims the right to represent in said corporation the majority of the capital stock of said corporation, and by means thereof has controlled, and still does control, the same and its business, and elects and has elected such officers thereof as the said defendant Irvine, deems for his interest, and as will obey his demands.

And the plaintiff avers that said defendant Irvine may at any time transfer the whole of said shares of said stock to a *bona fide* purchaser for a valuable consideration and without notice, and that he can, by his control of said company, cause the officers thereof to transfer the same on the books of said company to whomsoever he pleases, and may and does, by his management of said mine,
12 possess the power of raising or depressing the apparent value of said mine at will; that the said capital stock has no ascertained or market value, is owned by very few persons, and has never been placed upon any of the lists in any of the stock boards in this State, but that its intrinsic value is very great; that the said mining property of said company, is very rich and valuable, and may, by proper management, be made very remunerative to the stockholders, and be made to pay large dividends and profits; that the damages which this plaintiff suffers by reason of being deprived of his said stock cannot be estimated in any court of law, and that the plaintiff can have no adequate remedy, except in a court of equity, and the plaintiff avers, on his information and belief, that said defendant Irvine will transfer the said shares of stock, so as aforesaid held in trust for this plaintiff, unless restrained by
13 the injunction of this honorable court, and the appointment of a receiver herein to hold the said five thousand shares of said stock to abide the result of this action. And the plaintiff avers that during the time the said Thrie was the beneficiary as aforesaid in and under said trust, and prior to his assignment to said plaintiff the said defendants had due notice of the matters and things aforesaid.

Wherefore the plaintiff prays judgment that the said defendant Irvine be adjudged and decreed to be a trustee of five thousand shares of the capital stock of the said defendant corporation, The Morgan Mining Company, for the use and benefit of the said plaintiff, and that he be ordered to account to and with the plaintiff

of, and concerning all necessary expenses incurred in and about said mining property above referred to, and all assessments paid or to be paid upon said stock, and that the court may adjudge and
14 decree what sum upon such accounting is justly due to defendant from the plaintiff, or is a just claim against said stock, and that upon the payment of the same by the plaintiff the defendant Irvine be ordered and decreed to assign and transfer to this plaintiff five thousand shares of the said capital stock of the said corporation, The Morgan Mining Company, and that in the meantime, and until the final determination of this case, the said defendants be enjoined and restrained from assigning or transferring on the books of said company, or otherwise, or allowing to be transferred, capital stock of said corporation standing in the name of said defendant Irvine, so as to leave a less number of shares standing in his name than five thousand shares; and that a receiver may be appointed by this hon. court, to whom the said defendant Irvine shall be ordered to convey five thousand shares of said
15 capital stock of said corporation, to hold pending this action, and that the plaintiff may have such further or other relief as is meet in the premises and costs of suit.

WILSON & WILSON,
WM. HAYES,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Richard H. Sinton, being duly sworn, deposes and says: That he is the agent and attorney-in-fact of the plaintiff, Sumner T. Dunham, in relation to all the matters and things set forth and alleged in the foregoing complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true; that this affiant makes this affidavit on behalf of said plaintiff for
16 the reason that the said plaintiff is not within and is absent from the said city, county, and State where his said attorneys reside; and because the facts set forth in said complaint are more within the knowledge of this affiant than of the said plaintiff.

R. H. SINTON.

Subscribed and sworn to before me, this 25th day of February, 1876.

[NOTARIAL SEAL.]

HOLLAND SMITH,
Notary Public.

17 *Bill of Exceptions.*

EXHIBIT A.

This is to declare that I, William Irvine, of San Francisco, California, am the owner of one undivided half of that certain gold-

bearing quartz lode or mine situated on Carson Hill, Calavears county, California, and known familiarly as the "Morgan Mine," and that I hold said half interest equally for myself and R. H. Sinton, also of San Francisco, share and share alike; and I hereby promise and bind myself, my heirs and assigns, whenever said mine shall be sold, or otherwise disposed of, to account fully and truly to said Sinton, his heirs or assigns, for the one-half of all net proceeds of such sale or other disposition of said half interest.

All necessary expenses, including counsel fees heretofore incurred, or that may hereafter be incurred, in and about the
18 property, up to the time of such sale or other disposition thereof, to be first paid before division of such proceeds.

Witness my hand and seal, this 28th day of March, A. D. 1874.

(Signed) WILLIAM IRVINE. [SEAL.]

Witnesses:

(Signed) T. K. WILSON.

(Signed) H. J. TILDEN.

Let an injunction issue, as prayed for in the foregoing complaint, on pl'ff filing a proper bond in the sum of $1,500, with two sureties, to be approved by the clerk.

FEB. 25, 1876. E. D. WHEELER, *Judge*.

Endorsed: Filed Feb. 25th, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

19 *Undertaking on Injunction.*

In the District Court of the Nineteenth Judicial District of the State of California in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
against
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

Whereas the above-named plaintiff has commenced, or is about to commence, an action in the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco against the above-named defendants, and is about to apply for an injunction in said action against the said defendants enjoining and restraining them from the com-
20 mission of certain acts, as in the complaint filed in the said action is more particularly set forth and described—

Now, therefore, we, the undersigned, residents of the city and county of San Francisco, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of fifteen hundred ($1,500) dollars, and promise to the effect that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of fifteen hundred ($1,500) dollars, as such parties may sustain

by reason of the said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto.

Dated this twenty-fifth day of February, A. D. 1876.

J. A. FREANOR. [SEAL.]
THOS. BROWN. [SEAL.]

21 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

J. A. Freanor and Thomas Brown, whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself, says that he is worth the sum in the said undertaking specified, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. A. FREANOR.
THOS. BROWN.

Subscribed and sworn to before me, this 25th day of February, A. D. 1876.

[SEAL.] E. V. JOICE,
Notary Public.

Endorsed: Filed Feb. 25th, 1876. Thos. H. Reynolds, clerk. By Chas. W. Grant, deputy clerk.

22 *Return of Sheriff.*

OFFICE OF THE SHERIFF,
CITY AND COUNTY OF SAN FRANCISCO,
SAN FRANCISCO, *February 26th*, 1876.

I hereby certify and return that I received the annexed injunction on the 25th day of February, A. D. 1876, and personally served the same on the said 25th day of February, A. D. 1876, upon The Morgan Mining Company at 5.35 p. m., and upon William Irvine at 5.50 p. m. of said day, the therein-named defendants, by delivering to and leaving with the said William Irvine, one of said defendants, and W. G. Hughes, secretary of said The Morgan Mining Company, the other defendant, personally, in the city and county of San Francisco, a copy of said injunction, and at the same time showing to each of them the annexed original injunction, and informing them of the contents thereof. And I further certify that at the time
23 of said service as aforesaid I delivered to each of said defendants a copy of the complaint in said action, with verification thereto attached.

MATTHEW NUNAN, *Sheriff.*
By J. M. DWYER, *Deputy Sheriff.*

24 *Injunction.*

In the District Court of the Nineteenth Judicial District of the State of California in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM T. DUNHAM, THE MORGAN MINING COMPANY, Defendant. } Injunction.

The people of the State of California to William Irvine and The Morgan Mining Company, send greeting:

The above-named plaintiff, having filed his complaint in our district court of the nineteenth judicial district against the above-named defendants, praying for an injunction against said defendants, requiring them to refrain from certain acts in said
25 complaint, and hereinafter more particulary mentioned, on reading the said complaint in this action, duly verified, and it satisfactorily appearing to the judge of said court therefrom, that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given:

We therefore, in consideration thereof, and of the particular matters in the said complaint set forth, do strictly command you, and each and every of you, that until the further order of said court, you and each of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of you, or either of you, do absolutely refrain and desist from assigning or transferring, or permitting to be assigend or transferred, on the books of the said Morgan Mining Com-
26 pany, or otherwise, any number of shares of the capital stock of said company, which will leave less than five thousand shares standing in the name of said defendant Irvine.

Witness Hon. E. D. Wheeler, judge of the 19th judicial district, at the city and county of San Francisco, and the seal of the said court, this twenty-fifth day of February, A. D. 1876.

[SEAL.] THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. CROCKER, *Deputy Clerk.*

Endorsed: Filed March 3d, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

27 *Summons.*

In the District Court of the Nineteenth Judicial District of the State of California in and for the City and County of San Francisco.

SUMNER T. DUNHAM
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendant.

Action brought in the district court of the nineteenth judicial district of the State of California, in and for the city and county of

San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send greeting to William Irvine and The Morgan Mining Company, defendants:

You are hereby required to appear in an action brought
28 against you, the above-named plaintiff, in the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days, (exclusive of the day of service,) after the service on you of the summons, if served within this county, or if served out of this county, but in this district, within twenty days; otherwise, within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a decree, declaring that the defendant Irvine holds five thousand shares of the capital stock of said corporation, defendant, in trust for the plaintiff, and that said Irvine be ordered to account to and with the plaintiff for all expenses incurred by him, and which constitute a just claim against
29 the plaintiff, or said shares of stock, and that upon payment of the same by the plaintiff, he, the defendant Irvine, be adjudged and decreed to transfer and assign to the plaintiff said five thousand shares of stock, and that in the meantime, and pending this action the defendants be enjoined and restrained from assigning or transferring or allowing to be transferred on the books of said company, or otherwise, the said five thousand shares of capital stock, or any transfer that will leave standing in the name of said Irvine a less number of shares than five thousand, also for the appointment of a receiver of said five thousand shares, and other reliefs and costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the complaint

30 Given under my hand and seal of the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, this 25th day of February, in the year of our Lord one thousand eight hundred seventy-six.

[SEAL.] THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. CROCKER, *Deputy Clerk.*

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 25th day of February, A. D. 1876, and personally served the same on the same day of February, A. D. 1876, upon William Irvine and The Morgan Mining Company, the therein-named defendants, by delivering to W. G. Hughes, secretary of said company, and Wil-
31 liam Irvine, defendants, personally, in the city and county

of San Francisco, a copy of said summons, attached to a verified copy of the complaint in said action therein named.

Dated at San Francisco, this 25th day of Feb., 1876.

MATTHEW NUNAN, *Sheriff.*
By J. M. DWYER, *Deputy Sheriff.*

Endorsed: Filed March 3d, 1876. Thos. H. Reynolds, clerk By Chas. W. Crocker, deputy clerk.

Stipulation as to Answer.

In the District Court of the 19th Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE *et al.*, Defendants. } No. 4012.

It is hereby stipulated and agreed that the defendants have until and including April 1st, A. D. 1876, in which to answer herein, conditioned that the cause be placed upon the term calendar, as if the answer had been filed at this date.

San Francisco, March 14, 1876.

WILSON & WILSON, JR.,
Attorneys for Plaintiff.
GARBER & THORNTON,
Att'ys for Defendants.

Endorsed: Filed March 14, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

Answer of Morgan Mining Company.

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

The answer of the Morgan Mining Company, one of the defendants, to the bill of complaint of Sumner T. Durham, complainant.

This defendant reserving to itself all the right of exception to the said bill of complaint, for answer thereto, saith:

I.

This defendant says that it does not know that it did, and says that it does not and did not, at the time of the commencement of this action, claim any right, title, or interest of, in, or to the stock mentioned in the said bill; and this defendant disclaims all right, title, and interest to said five thousand (5,000) shares of stock and every part thereof.

And this defendant denies all and all manner of combination and confederacy, wherewith it is by the said bill charged without this, that there is another matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein, and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to
36 aver, maintain, and prove as this honorable court shall direct; and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GARBER & THORNTON,
Deft's Att'ys.

D. M. McCLURE, *Of Counsel.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Charles T. Botts, being duly sworn, deposes and says that he is an officer, to wit, the president of the above-named defendant, The Morgan Mining Company; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to those matters, he believes it to be true.

CHAS. T. BOTTS.

Subscribed and sworn to before me, this 1st day of April, A. D. 1876.

[SEAL.]

E. H. THARP,
Notary Public.

37 Endorsed: Filed April 1st, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

38 *Answer of Wm. Froine.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

The answer of William Irvine, one of the defendants, to the bill of complaint of Sumner T. Dunham, complainant.

This defendant reserving to himself all right of exception to the said bill of complaint for answer thereto, saith:

I.

He denies that on the 28th day of March, A. D. 1874, or
39 at any other time, this defendant and the Richard H. Sinton

mentioned in said bill, were joint or equal owners of the premises described in said bill as the Morgan Mine, or of any portion thereof, or of any interest therein, and on the contrary this defendant says that the said Sinton never was the owner of an undivided fourth, or of any other proportion, share, or interest of or in said premises or any part thereof, and never had any right, title, interest, share, or estate of, in, or to the same or any portion thereof, either jointly or severally, legally or equitably.

And this defendant denies that the legal title to the said premises, or to any portion, part, or share thereof, was taken or was ever held by him in trust for himself and said Sinton equally, or share and share alike, or otherwise, or in trust for said Sinton, to
40 any extent or in any manner, or at all.

And this defendant denies that an undivided one-half of said premises, or any other interest therein, was acquired by him and said Sinton, or by their mutual efforts, or at their mutual expense, or for their common or equal benefit, or by, upon, or pursuant to any agreement to acquire the title thereto, or to sell or otherwise dispose of the same, or to equally or otherwise share the profits or losses arising thereupon. And this defendant admits that he held the title to one undivided one-half of said premises in trust for divers persons other than said Sinton, Irvine, and Dunham, as is alleged in said bill, but as to the remaining and other undivided one-half thereof this defendant says that long prior to said 28 day of March, A. D. 1874, he acquired the same individually and for his own sole and exclusive use and benefit, and that to the
41 acquisition thereof the said Sinton contributed neither effort nor expense, and that the same was not acquired pursuant to, nor was there any agreement between this defendant and said Sinton.

II.

And this defendant denies that upon the said 28th day of March, A. D. 1874, or at any other time, this defendant and the said Sinton made or entered into any agreement in reference to said premises or any portion or part or share thereof by which this defendant agreed to hold an undivided half, or any portion, share, or interest of or in said premises, equally or otherwise, for himself and said Sinton, or for said Sinton at all, or in any manner, or to any extent, or promised, bound himself, whenever said premises should be sold or otherwise disposed of, to account to said Sinton, or his heirs or assigns, for one-half or other portion of the net or
42 other proceeds of such sale or disposition, or of any sale or disposition, or that any expenses should be paid before division of any proceeds, or that there should be any division, and denies that said premises, or any portion, share, or interest thereof or therein were or was ever owned by this defendant and said Sinton, equally or otherwise, or in trust for the use of said Sinton, in any manner whatever.

And this defendant further denies that on said 28th day of March, A. D. 1874, or at any other time, he made or entered into any agreement with said Sinton in reference to said premises, or any portion thereof, or any share or interest therein, or at all concerning the same, save and except as is hereafter fully set forth and admitted.

III.

And as to the allegations contained in Article 3 of said bill of complaint, this defendant says that he has no information
43 or belief upon the subject sufficient to enable him to answer said allegations, and that this defendant is an utter stranger to all and every such matter, and cannot form any belief concerning the same; and therefore he denies that the said Sinton assigned, transferred, or conveyed anything, or this right, title, or interest in anything, to the George P. Thrie mentioned in said bill.

And this defendant denies that he received from the corporation mentioned in Article 4 of said bill ten thousand shares of its capital stock, or any number of shares exceeding nine thousand seven hundred and sixty-three shares thereof, and denies that said Thrie became or was entitled to five thousand or any shares of said stock.

V.

And as to the allegations contained in Article 5 of said bill of complaint, this defendant says that he has no information
44 or belief upon the subject sufficient to enable him to answer said allegations; and that this defendant is an utter stranger to all and every such matter, and cannot form any belief concerning the same; and therefore he denies that on the 29th day of June, A. D. 1875, or at any other time, the said Thrie conveyed, transferred, or assigned to the plaintiff any right, title, or interest in or to said premises or shares, or that the said plaintiff ever became or was vested with any right or interest alleged in said bill to have appertained or belonged to said Sinton, or that this defendant is or ever was the trustee of said plaintiff, or holds or ever held for the use or benefit of said plaintiff any share or shares of said stock.

VI.

And this defendant denies that he, with others, acting in
45 concert with him, or otherwise, represents, or claims the right to represent, in the corporation mentioned in said bill the majority of its capital stock, or by means thereof, or otherwise, has controlled, or does control, the same, or its business, or elects, was elected such officers thereof as this defendant deems for his interests, or as will obey his demands, or that by his control of said company defendant can or could cause any transfer of said stock, or may, or might, or does, or did, by his management of said mine, or otherwise, possess the power of raising or depressing the apparent value of said mine at will.

This defendant denies that said stock has no ascertained and market value, or that the damages which the plaintiff suffers by reason of being deprived of said stock herein claimed by him, cannot be estimated in any court of law, or that said plaintiff
46 can have no adequate remedy except in a court of equity, or that this defendant will transfer the said stock unless restrained.

And this defendant denies that said Thrie ever was a beneficiary as alleged in said bill, or that at any time defendants had notice of any of the matters or things set forth in said complaint, except such as are herein expressly set forth and admitted.

VII.

And as to the allegation in Article 2 of said bill, as follows, to wit: "And the said defendant, Irvine, thereupon upon said 28 day of March, A. D. 1874, made and executed to said Sinton his certain instrument and declaration of trust in writing, a copy of which is hereunto annexed, marked Exhibit A, and made part of this complaint," this defendant denies that on said 28 day of March, A. D. 1874, or at any time, he made or executed said instrument
47 or declaration, but on the contrary thereof this defendant says that on or about the said 28 day of March, 1874, in the city of San Francisco, the said Sinton approached this defendant with the said instrument, Exhibit A, already drawn, in his hands and requested this defendant to execute the same; that in answer to such proposition this defendant positively refused to execute said instrument, and in explanation of such his refusal told said Sinton that he had no right or interest in said premises, and asked said Sinton whether he claimed any right or interest in said premises. That said Sinton replied that he did not, and that he knew that he had none, but said that there had always existed a great friendship between him and this defendant, and that this defendant had promised him, if he made a large amount of money out of said mine he would do something for him,
48 said Sinton. And this defendant says that at the time of said conversation he was about to go to the Atlantic States, expecting to be absent from California several months, of which said Sinton was well aware, and that during said conversation said Sinton, in order to induce this defendant to sign said instrument, stated to this defendant that he, this defendant, might die on this trip; that thereupon this defendant requested said Sinton to go with him to the office of T. K. Wilson, one of the subscribing witnesses to said instrument, who was then the attorney-at-law of this defendant, and that after finding said Wilson in his office, this defendant, in the presence, of said Sinton handed said instrument to said Wilson, and requested him to read the same, and after he had read the same, stated to said Wilson in the presence and hear-
49 ing of said Sinton that although said Sinton had no right to any portion of said premises, or to any interest therein, yet

that as a mere gratuity this defendant was willing to sign said instrument upon the express agreement and understanding that when signed the same should be left in the custody and under the control of the said Wilson, with directions, and upon the understanding that it should have no effect whatever, except in the case of the death of this defendant upon said journey, and that in case this defendant should return to California, the said instrument should be inoperative, and should be returned to this defendant, and that in no event should said Wilson allow said said instrument to go out of his hands or part, or part with the custody and control thereof, except the said defendant should die before returning
50 to California; that said Sinton thereupon agreed to said terms and consented that this defendant should sign and said Wilson should hold said instrument upon the conditions aforesaid, and so stated by this defendant in his hearing. Defendant further says that thereupon and upon the express understanding and conditions aforesaid he did sign said instrument, and did place the same in the hands and custody of said Wilson with the consent of said Sinton, and that said Wilson has ever since retained the same and had the custody and control thereof; and that said instrument never was in any manner delivered to said Sinton, and that it never was the intention of this defendant to part with the custody, control, and full and absolute dominion of the said instrument, except as hereinabove specified, and that said Sinton was aware of such the inten-
51 tion of this defendant, and acquiesced therein. And that at the time of the signing of said instrument it was fully understood and agreed by and between this defendant and the said Sinton that no trust was to be, or was, created by, said instrument or by the signing thereof, or by the handing the same to the said Wilson, or the placing thereof in the hands of said Wilson, and that the signing thereof and the giving the same to said Wilson and all the acts then performed and all the stipulations then made were to have no greater effect than to enable said Sinton to demand the delivery of said instrument to him only in the event and upon the contingency that this defendant should not survive said journey and return to California, and that in case he did so survive and return, the said instruments should be delivered up to this defendant, and should be utterly void and
52 of no effect whatever; and that if the defendant did so survive and return the said premises should absolutely belong to this defendant, and said Sinton should have no right, title, interest, claim, or demand thereto, or to any share or interest therein, but that the title, both legal and equitable, thereto should remain vested in this defendant fully and absolutely, and as the same was vested prior to the signing of said instrument.

And this defendant says that he would not have signed said instrument upon any other terms than those above set forth, and that if said Sinton had not expressly agreed thereto, he would have refused to sign the same; and defendant says that after so signing

said instrument he did make said journey, and did return therefrom to California about the month of August, A. D. 1874.

53 VIII.

And this defendant submits that all and every the matters in the said bill of complaint mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said plaintiff is not entitled to any relief from a court of equity. And this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said bill. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said bill, contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the

54 knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this hon. court shall direct, and humbly prays to be hence dismissed with his costs and charges in this behalf sustained. GARBER & THORNTON, *Deft's Att'ys.*

D. M. McCLURE, *of Counsel.*

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

William Irvine, being duly sworn, deposes and says, that he is one of the defendants in the above-entitled action; that he has read the foregoing separate answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and that as to those matters he believes it to be true.

55 WILLIAM IRVINE.

Subscribed and sworn to before me, this 1st day of April, 1876.
[SEAL.] E. H. THARP, *Notary Public.*

Endorsed: Filed April 1st, 1867. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

56 *Petition of Defendants that Cause be Removed to the U. S. Circuit Court, Dist. of Cal.*

In the District Court of the Nineteenth Judicial District of the State of California in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

To the honorable the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco:

The petition of William Irvine, of the city of San Francisco, and

of the Morgan Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Cali-
57 fornia, and having its office in the city of San Francisco, respectfully shows, that your petitioners and the defendants in this suit, and that the same was brought by Sumner T. Dunham, plaintiff, on or about the 25th day of February, 1876, in the district court of the nineteenth judicial district of the State of California, to be held in the city and county of San Francisco, in the said judicial district, and that said plaintiff is, and was, at the time of bringing this suit, a citizen of the State of New York, and that your petitioners are, and were, at the time of bringing this suit, citizens of the State of California.

And your petitioners further respectfully show that said plaintiff claims in the summons and complaint in this suit five thousand shares of the capital stock of the Morgan Mining Company, and that said stock is worth more than one dollar per share, and
58 that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further respectfully represent that this suit is brought by the said plaintiff against the said defendants, demanding five thousand shares of the capital stock of the Morgan Mining Company of and from the defendant, William Irvine, and demanding that the said defendants, William Irvine and the Morgan Mining Company, be enjoined and restrained until the final determination of this case from assigning or transfering on the books of said company, or otherwise, or allowing to be transferred, capital stock of said corporation standing in the name of said defendant, Irvine, so as to leave a less number of shares standing in his name than five thousand shares.

And your petitioners further respectfully represent that this suit has not yet been tried, but that the same is pending
59 for trial in the district court, the nineteenth judicial district of the State of California, in and for the city of San Francisco; and that these defendants make and file this petition in this suit in said district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, before the term thereof, at which the suit could be first tried, and that the next term of said district court of the nineteenth judicial district, in and for the city and county of San Francisco, which is the term thereof at which this suit could be first tried, begins on the first Monday of April, A. D. 1876; and that the present pending term of said district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, began on the first Monday of December, A. D. 1875, and will expire by law when the aforesaid next
60 term thereof begins as aforesaid, and that your petitioners desire to remove this suit before the trial thereof unto the next circuit court of the United States to be held in the district of California, in the ninth circuit, in pursuance of the provisions of

law as contained in the act of Congress approved March third, one thousand eight hundred and seventy-five, entitled An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removnl of causes from State courts, and for other purposes. And that they are ready and willing to give such good and sufficient surety as may be required for doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and they offer herewith their bond, executed by George Irvine, of the city of San Fran-
61 cisco, as surety, in the penal sum of two thousand dollars, conditioned that your petitioners shall enter in the next circuit court of the United States to be held in the district of California, in the ninth circuit, on the first day of its session, a copy of the record in this suit, and doing such other appropriate acts as by the said acts of Congress approved March third, eighteen hundred and seventy-five, are required to be done upon the removal of a suit into the United States courts, as good and sufficient surety, according to the said provisions of law upon the removal of a suit into the United States court. And your petitioners therefore pray that the said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the district of California, in the ninth circuit, pur-
62 suant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court; and your petitioners will ever pray.

WILLIAM IRVINE. [SEAL.]
MORGAN MINING COMPANY. [SEAL.]
By CHAS. T. BOTTS, *President.*
GARBER & THORNTON, *Attorneys for Defendants.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

William Irvine, one of the petitioners in the foregoing petition, being duly sworn, deposes and says that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the
63 matters therein stated on information and belief, and as to those matters that he believes it to be true.

WILLIAM IRVINE.

Subscribed and sworn to before me, this 1st day of April, A. D. 1876.

[SEAL.] E. H. THARP,
Notary Public.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles T. Botts, being duly sworn, deposes and says that he is

the president of the Morgan Mining Company, the corporation defendant herein, and that he makes this affidavit on behalf of said corporation defendant, and that he has read the foregoing petition to which he has subscribed the name of said corporation, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information belief, and as to these matters he believes it to be true, and further saith not.

64 CHARLES T. BOTTS.

Subscribed and sworn to before me, this first day of April, A. D. 1876.

[SEAL.] E. H. THARP,
Notary Public.

65 *Bond on Removal of Cause.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

We, William Irvine, of the city of San Francisco, in the State of California, and the Morgan Mining Company, a corporation organized and existing under and by virtue of the laws of the State of California, as principals, and George Irvine, of the city of San Francisco, as surety, are held and firmly bound unto Sumner T. Dunham, of New York, in the sum of two thousand dollars, lawful money
66 of the United States of America, to be paid to the said Sumner T. Dunham, his successors or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated the first day of April, A. D. 1876.

Whereas a suit was brought on or about the 25th day of February, A. D. 1876, in the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, by the said Sumner T. Dunham against the said William Irvine and the Morgan Mining Company, and the same is now pending for trial in said court, in said city and county of San Francisco, and is removable into the circuit court of the United States
67 for the district of California, in the ninth circuit, under the act of Congress, approved March third, eighteen hundred seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes;"

And whereas the said William Irvine and the Morgan Mining Company have filed their petition in said district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, for the removal of said suit into the

next circuit court of the United States, to be held in the district of of California:

Now, therefore, the condition of the above obligation is such that if the above bounden William Irvine and the Morgan Mining Company, or their legal representatives, shall enter, or cause to be entered, in the circuit court of the United States for the dis-
68 trict of California, on the first day of its stated session next ensuing after the filing of said petition in said district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, for the removal of said suit into said circuit court a copy of the said record in said suit, and do, or cause to be done, such other appropriate acts, as by the said act of Congress, approved March third, eighteen hundred and seventy-five, and required to be done upon the removal of a suit into the United States court, then the above obligation be void, otherwise to remain in full force and virtue.

WILLIAM IRVINE. [SEAL.]
MORGAN MINING COMPANY, [SEAL.]
By CHAS. T. BOTTS, *President.*
GEORGE IRVINE. [SEAL.]

69 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

George Irvine, the surety in the foregoing obligation named, being duly sworn, deposes and says that he is a resident of the State of California and a householder therein, and is worth the sum of two thousand dollars over all his just debts and liabilities, and exclusive of property exempt by law from execution.

GEORGE IRVINE.

Subscribed and sworn to before me, this first day of April, A. D. 1876.

[SEAL.] E. H. THARP,
Notary Public.

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

I certify that on the first day of April, A. D. 1876, before me, personally appeared William Irvine and George Irvine, to
70 me known to be the persons described in, and who executed the foregoing instrument, and severally acknowledged to me that they executed the same as their own free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal.

[SEAL.] E. H. THARP,
Notary Public.

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

I certify that on the first day of April, A. D. 1876, before me

personally appeared Charles T. Botts, to me known to be the president of the Morgan Mining Company, a corporation duly organized under and by virtue of the laws of the State of California, whose name is subscribed to the annexed instrument, who is per-
71 sonally known to me to be the individual described in, and who executed the same. The said The Morgan Mining Company being named in the said instrument, and known to me to be the corporation described therein, and that executed the same as a party thereto, and acknowledged to me that he executed the same freely and voluntarily as such president, and as and for the act and deed of the said Morgan Mining Company, and that said corporation executed the same for the uses and purposes therein mentioned, and that the seal, which is thereto affixed, is the corporate seal of said corporation, and was thereto affixed by authority thereof.

Witness my hand and official seal.

[SEAL.] E. H. THARP,
Notary Public.

72 In the District Court of the Nineteenth Judicial District of the State of California in and for the city and county of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

Charles T. Botts, being duly sworn, deposes and says, that "The Morgan Mining Company," one of the defendants, is a corporation organized and existing under and by virtue of the laws of the State of California, and that this deponent is the president of the said corporation defendant; that on the 30th day of March, A. D. 1876, the trustees of said corporation, duly and legally passed a
73 resolution in the following words: "Resolved, That this company desires to remove, and shall remove, the case of Sumner T. Dunham *vs.* William Irvine and the Morgan Mining Company from the district court of the nineteenth judicial district of the State of California into the circuit court of the United States for the District of California, and that the president of the company and Messrs. Garber & Thornton, attorneys, be and they are authorized and instructed to do all things for and in the name of the company necessary and proper to said removal." And deponent says that he has signed the name of the corporation to said petition and bond, and has affixed to said petition and bond the seal of the corporation.

CHAS. T. BOTTS.

Subscribed and sworn to before me, this 1st day of April, 1876.

[SEAL.] E. H. THARP,
Notary Public.

74 *Notice of Removal of Cause.*

In the District Court of the 19th Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

To Messrs. WILSON AND WILSON, *Attorneys for Plaintiff.*

GENTLEMEN: Please take notice that on the petition of the defendants in this suit and the bond accompanying the same, copies of which petition and bond as herewith served and on all the
75 papers and proceedings in this suit, we shall resume this suit on the first day of April, A. D. 1876, from this above-entitled court to the circuit court of the United States for the district of California, under the provisions of the act of Congress, approved the 3d day of March, A. D. 1875.

Dated April 1st, 1876.

GARBER & THORNTON,
Att'ys for Defendants.

D. M. McCLURE, *Of Counsel.*

Certificate of Clerk.

I, Thomas H. Reynolds, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the nineteenth district court, in and for said city and county, hereby certify the foregoing to be a full and true copies of complaint, summons, undertaking, and writ of injunction, stipulation,
76 answer Morgan Mining Co., answer of William Irvine, petition, bond, and notice of removal to U. S. circuit court, No. 1, now on file, remaining in my office.

Attest my hand and seal of said court, this 25th day of May, A. D. 1876.

[SEAL.] THOMAS H. REYNOLDS, *Clerk.*
By W. STEVENSON, *Deputy Clerk.*

Endorsed: Filed April 1st, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

In Circuit Court of the United States of America, District of California.

Filed 17th June, 1876.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

77 *Bill of Complaint to Declare a Trust, &c.*

In the District Court of the Nineteenth Judicial District of the State of California, within and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

The above-named plaintiff complains of the above-named defendants, and for cause of action avers that heretofore, to wit, on the 28th day of March, A. D. 1874, the defendant William Irvine and Richard H. Sinton, of said city and county, were joint and equal owners of the one undivided half of that certain gold-bearing quartz lode and mine, situated on Carson Hill, in the county of Cala-
78 veras, in said State of California, familiarly known as and called the "Morgan Mine;" that the legal title to said undivided one-half of said mine and mining property had been theretofore taken and then stood in the name of said defendant Irvine, but had been so taken, and was on the date aforesaid held by said Irvine in trust for himself and said Sinton equally and share and share alike; that said interest in said mining property had been and was acquired by said Irvine and Sinton by their mutual efforts and at their mutual expense, and for their common and equal benefit, and by and upon and pursuant to an agreement between them to acquire the title thereto, and to sell or otherwise dispose of the same, and to equally share the profits and losses arising thereupon; and that the other undivided half of said mining property
79 was, as plaintiff avers, on information and belief, then and there held by said Irvine in trust for divers other persons.

II.

That upon the said 28th day of March, A. D. 1874, the said defendant Irvine and said Sinton made and entered into an agreement in reference to said undivided half of said mining property so owned by them equally, and so held in the name of said Irvine, but in trust for their common use and benefit as aforesaid, by which the said Irvine agreed to hold said undivided one-half of said mining property equally for himself and said Sinton, share and share alike, and promised and bound himself, whenever said mining property should be sold or otherwise disposed of by him, to account fully and truly to said Sinton, his heirs, or assigns for the one-
80 half of all net proceeds of such sale or other disposition of said one-half interest; and it was then and there further agreed between said defendant Irvine and said Sinton that all necessary expenses, including counsel fees theretofore incurred, or that might thereafter be incurred in and about the property, up to the time of such sale or other disposition thereof, should be first paid

out of the proceeds of such sale or other disposition before division of the proceeds.

And the said defendant Irvine thereupon upon said 28th day of March, A. D. 1874, made and executed to said Sinton his certain instrument and declaration of trust in writing, a copy of which is hereunto annexed, marked Exhibit A, and made part of this complaint.

III.

And the plaintiff avers that thereafter, to wit, on the 8th
81 day of September, A. D. 1874, the said Sinton duly assigned, transferred, and conveyed to one George P. Thrie all his right, title, and interest in said mining property, and all his right, title, and interest in and to the said declaration of trust and everything coming, or that might come, to him under or by virtue thereof

IV.

And the plaintiff avers that afterwards, to wit, upon the 12th day of March, A. D. 1875, the said Irvine and the owners of the other undivided half of said mining property formed themselves into a corporation under the laws of the State of California, called the Morgan Mining Company, being the corporation defendant herein; that the purposes for which said corporation was formed were as declared in its articles and certificate of incorporation: "To
82 sell or work and develop that mining property in the county of Calaveras, State of California, formerly known as the Carson Hill or Morgan Mine, it being the same property conveyed to William Irvine by letters patent of the United States, bearing date March ninth, A. D. eighteen hundred and seventy-four, recorded in the office of the county recorder of the said county of Calaveras, in Book W of Deeds, at pp. 554, 555, 556, 557, 558, and 559."

"And for this purpose to purchase adjacent lodes, construct, buy and sell mills, water rights, and mill sites, flumes, timber lands. To reduce ores, and to buy and sell the same, and to do all other things that may be necessary and proper in or about the selling or development of said property."

That its principal place of business is the said city and county of San Francisco, and its time of existence is to be fifty years after
83 said 12th day of March, 1875.

And plaintiff avers that said corporation then and there duly organized and still continues in existence.

And the plaintiff avers that after the organization of said corporation defendant as aforesaid, to wit, on the 9th April, 1875, the said defendant Irvine and the other owners of said mining property, except said Thrie, disposed of the said mining property to said corporation defendant by selling and conveying the same to said corporation in consideration of certain shares of the capital stock of said company, and that said corporation duly issued to said owners

the number of shares proportioned to their interests in said mining property, and that said defendant Irvine received from said corporation ten thousand shares of said capital stock as the consideration coming to him as the holder of the undivided one-half of said mining property, being the one-half held by him in trust
84 for himself and said Thrie as the grantee and assignee of said Sinton, and that said Thrie then and there became entitled to the one-half of said last-named shares of said stock; that is to say, five thousand shares, subject, however, to the payment by him of his just share of the expenses referred to in the said Exhibit A, hereunto annexed.

V.

And the plaintiff avers that afterwards, to wit, on the 29th day of June, 1875, the said Thrie duly conveyed, transferred, and assigned to the plaintiff all his right, title, and interest in and to said mining property and said shares of the capital stock aforesaid, and the plaintiff has now become vested with all the rights and interests which by reason of the premises formerly appertained and belonged to said Sinton; and that said defendant Irvine is now the
85 trustee of this plaintiff, and holds for the use and benefit of this plaintiff the said shares of the capital stock of said corporation to the extent of five thousand shares, subject to the payment of the necessary expenses referred to in said Exhibit A.

VI.

And the plaintiff avers that, after the said 29th day of June, 1875, he applied to the said defendant Irvine for an account of all necessary expenses, including counsel fees, incurred by him before, on, and after the said 28th day of March, A. D. 1874, in and about said mining property up to the time of the disposition of the same to said corporation, and has offered to pay to said defendant Irvine the one-half thereof, and did then and there demand that said defendant Irvine should assign and transfer to the plaintiff the said last-named number of shares of stock of said corporation, so as
86 aforesaid held by him; but that said defendant Irvine wholly refused to make or render to this plaintiff any account in the premises, and wholly denies the rights of the plaintiff in the premises, and denies his said trust, and refuses in any manner and without just cause to recognize this plaintiff as having any interest in the premises, and claims to own and hold for his own exclusive use the whole of said shares so as aforesaid transferred to him, and denies that he ever was trustee in the premises for said Sinton, or said Thrie, or this plaintiff, of any of the matters aforesaid, or at all.

And the plaintiff avers that he is now ready and anxious to enter into an accounting with the said defendant Irvine of and concerning all necessary expenses, including counsel fees, at any
87 time incurred or paid by said defendant Irvine in or about the property aforesaid up to the time of said sale, or dispo-

sition of the same to said corporation, and offers to pay into court the one half part of all such expenses, and all further or other sums that this honorable court may deem just and equitable, or proper, or may at any time order or decree.

VII.

And the plaintiff further avers that he is informed and believes that, with the said number of shares so transferred to said defendant Irvine, the one-half of which is held as aforesaid in trust for this plaintiff, said defendant Irvine, with others acting in concert with him, represents and claims the right to represent in said corporation the majority of the capital stock of said corporation, and by means thereof has controlled, and still does control,
88 the same, and its business and effects, and has elected such officers thereof as the said defendant Irvine deems for his interest and as will obey his demands.

And the plaintiff avers that said defendant Irvine may at any time transfer the whole of said shares of said stock to a *bona fide* purchaser for a valuable consideration, and without notice, and that he can, by his control of said company, cause the officers thereof to transfer the same on the books of said company to whomsoever he pleases, and may and does by his management af said mine possess the power of raising or depressing the apparent value of said mine at will; that the said capital stock has no ascertained or market value, is owned by very few persons, and has never been placed upon any of the lists on any of the stock boards in this State, but that its intrinsic value is very great, that the said mining property
89 of said company is very rich and valuable, and may by proper management be made very remunerative to the stockholders, and be made to pay large dividends and profits; that the damages which this plaintiff suffers by reason of being deprived of his said stock cannot be estimated in any court of law; and that the plaintiff can have no adequate remedy except in a court of equity; and the plaintiff avers, on his information and belief, that said defendant Irvine will transfer the said shares of stock so as aforesaid held in trust for this plaintiff unless restrained by the injunction of this honorable court, and the appointment of a receiver herein to hold the said five thousand shares of said stock to abide the result of this action.

And the plaintiff avers that during the time the said Thrie
90 was the beneficiary as aforesaid, in and under said trust, and prior to his assignment to said plaintiff, the said defendants had due notice of the matters and things aforesaid.

Wherefore the plaintiff prays judgment that the said defendant Irvine be adjudged and decreed to be a trustee of five thousand shares of the capital stock of the said defendant corporation, The Morgan Mining Company, for the use and benefit of the said plaintiff, and that he be ordered to account to and with the plaintiff of and concerning all necessary expenses incurred in and about said

mining property above referred to, and all assessments paid or to be paid upon said stock, and that the court may adjudge and decree what sum upon such accounting is justly due to defendant from the plaintiff, or is a just claim against said stock; and
91 that upon the payment of the same by the plaintiff, the defendant Irvine be ordered and decreed to assign and transfer to this plaintiff five thousand shares of the said capital stock of the said corporation, The Morgan Mining Company, and that in the meantime and until the final determination of this case, the said defendants be enjoined and restrained from assigning or transferring on the books of said company, or otherwise, or allowing to be transferred, capital stock of said corporation standing in the name of said defendant Irvine, so as to leave a less number of shares standing in his name than five thousand shares, and that a receiver may be appointed by this hon. court, to whom the said defendant Irvine shall be ordered to convey five thousand shares of said capital stock of said corporation, to hold pending this action, and that the plaintiff may have such further or other relief as
92 is meet in the premises, and costs of suit.

WILSON & WILSON,
WM. HAYES,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Richard H. Sinton, being duly sworn, deposes and says, that he is the agent and attorney-in-fact of the plaintiff Sumner T. Dunham, in relation to all the matters and things set forth and alleged in the foregoing complaint; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be be true.

That this affiant makes this affidavit on behalf of said
93 plaintiff, for the reason that the said plaintiff is not within, and is absent from the said city, county, and State where his said attorneys reside, and because the facts set forth in said complaint are more within the knowledge of this affiant than of the said plaintiff.

R. H. SINTON.

Subscribed and sworn to before me, this 25th day of February, 1876.

[SEAL.] HOLLAND SMITH,
Notary Public.

EXHIBIT A.

This is to declare that I, William Irvine, of San Francisco, California, am the owner of one undivided half of that certain gold-bearing quartz lode, or mine, situated on Carson Hill, Cala-
94 veras county, California, and known familiarly as the "Morgan Mine," and that I hold said half interest equally for my-

self and R. H. Sinton, also of San Francisco, share and share alike, and I hereby promise and bind myself, my heirs and assigns, whenever said mine shall be sold, or otherwise disposed of, to account fully and truly to said Sinton, his heirs or assigns, for the one-half of all net proceeds of such sale or other disposition of said half interest.

All necessary expenses, including counsel fees, heretofore incurred, or that may hereafter be incurred, on and about the property up to the time of such sale, or other disposition thereof, to be first paid before division of such proceeds.

Witness my hand and seal this 28th day of March, A. D. 1874.

(Signed) WILLIAM IRVINE. [SEAL]

Witnesses:

(Signed) T. K. WILSON.
(Signed) H. J. TILDEN.

95 Let an injunction issue, as prayed for in the foregoing complaint, on pl'ff filing a proper bond in the sum of $1,500, with two sureties to be approved by the clerk.

Feb. 25th, 1876.

E. D. WHEELER,
Judge.

Endorsed: Filed Feb. 25th, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

96 *Summons.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

Action brought in the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco, and the Complaint filed in said City and County of San Francisco, in the office of the Clerk of said District Court.

The People of the State of California send greeting to William Irvine and The Morgan Mining Company, Defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the nineteenth judicial district of the State of California, in and for
97 the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment

by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a decree declaring that the defendant Irvine holds five thousand shares of the capital stock of said corporation defendant in trust for the plaintiff, and that said Irvine be ordered to account to and with the plaiutiff for all expenses incurred by him, and which constitute a just claim against the plaintiff or said shares of stock, and that upon payment of the same by the plaintiff, he, the defendant Irvine, be adjudged and decreed to transfer and assign to the plaintiff said five thou-
98 sand shares of stock, and that in the meantime and pending this action the defendant be enjoined and restrained from assigning or transferring, or allowing to be transferred, on the books of said company, or otherwise, the said five thousand shares of capital stock, or any transfer that will leave standing in the name of said Irvine a less number of shares than five thousand; also for the appointment of a receiver of said five thousand shares, and for further and other relief, and costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and seal of the district court of the nineteenth judicial district of the State of California, in and for
99 the city and county of San Francisco, this 25th day of February, in the year of our Lord one thousand eight hundred and seventy-six

[SEAL.] THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. CROCKER, *Deputy Clerk.*

[Endorsed.]

OFFICE OF THE SHERIFF OF THE
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on the 25th day of February, A. D. 1876, and personally served the same on the same day of February, A. D. 1876, upon William Irvine and the Morgan Mining Company, the therein-named defendants, by delivering to W. G. Hughes, secretary of said company, and William Irvine, said defendants, personally, in the city and county of San Francisco, a copy of said summons attached to a verified copy of the complaint in said action therein named.
100 Dated at San Francisco, this 25th day of Feb., 1876.

MATTHEW NUNAN, *Sheriff.*
By J. M. DWYER, *Deputy Sheriff.*

Filed March 3d, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

101 *Undertaking on Injunction.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.
} Undertaking on Injunction.

Whereas the above-named plaintiff has commenced, or is about to commence, an action in the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, against the above-named defendants, and is about to apply for an injunction in said action against the said de-
102 fendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the city and county of San Francisco, in consideration of the premises, and of the issuing of said injunction, do jointly and severally undertake in the sum of fifteen hundred ($1,500) dollars, and promise to the effect that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of fifteen hundred ($1,500.00) dollars, as such parties may sustain by reason of the said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto.

Dated this 25th day of February, A. D. 1876.

J. A. FREANER. [SEAL.]
THO. BROWN. [SEAL.]

103 *Bond on Undertaking.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

J. A. Freaner and Thomas Brown, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself says that he is worth the sum in the said undertaking specified, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. A. FREANER.
THO. BROWN.

Subscribed and sworn to before me, this 25th day of February, A. D. 1876.

[SEAL.] E. V. JOICE,
Notary Public.

Endorsed: Approved this 25th day of Feb., A. D. 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy. Filed Feb. 25, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy.

104 *Return of Service, &c.*

OFFICE OF THE SHERIFF, CITY AND COUNTY OF SAN FRANCISCO,
SAN FRANCISCO, *February 26th*, 1876.

I hereby certify and return that I received the annexed injunction on the 25th day of February, A. D. 1876, and personally served the same on the said 25th day of Febrbary, A. D. 1876, upon the Morgan Mining Company at 5.35 p. m., and upon William Irvine at 5.50 p. m., of said day, the therein-named defendants, by delivering to and leaving with the said William Irvine, one of said defendants, and W. G. Hughes, secretary of said The Morgan Mining [Company], the other said defendant, personally, in the city and county of San Francisco, a copy of said injunction, and at the same time showing to each of them the annexed original injunc-
105 tion informing them of the contents thereof; and I further certify that at the time of said service as aforesaid I delivered to each of said defendants a copy of the complaint in said action, with verification thereto attached.

MATTHEW NUNAN, *Sheriff.*
By J. M. DWYER, *Deputy Sheriff.*

106 *Injunction.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the city and county of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

The people of the State of California to William Irvine and the Morgan Mining Company, send greeting:

The above-named plaintiff having filed his complaint in our district court of the nineteenth judicial district against the above-named defendant, praying for an injunction against said de-
107 fendants, requiring them to refrain from certain acts in said complaint, and hereafter more particularly mentioned, on reading the said complaint in this action, duly verified, and it satisfactorily appearing to the judge of said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given:

We, therefore, in consideration thereof, and of the particular matters in the said complaint set forth, do strictly command you, and each and every of you, that, until the further order of said court, you, and each of you, your, and each of your, servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of you, or either of you, do absolutely refrain from, and desist from assigning or transferring, or permitting to be

assigned or transferred, on the books of the said Morgan
108 Mining Company, or otherwise, any number of shares of the capital stock of said company which will leave less than five thousand shares standing in the name of said defendant Irvine.

Witness Hon. E. D. Wheeler, judge of the 19th judicial district, at the city and county of San Francisco, and the seal of the said court, this twenty-fifth day of February, A. D. 1876.

[SEAL.] THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. CROCKER, *Deputy Clerk.*

Endorsed: Filed March 3d, 1876. Thomas H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

109 *Stipulation that Def'd'ts have Further Time to Answer.*

In the District Court of the 19th Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE *et al.*, Defendants. } No. 4012.

It is hereby stipulated and agreed that the defendants have until and including April 1st, A. D. 1876, in which to answer herein, conditioned that the cause be placed upon the term calendar, as if the answer had been filed at this date.

SAN FRANCISCO, *March 14th*, 1876.

WILSON & WILSON,
Attorneys for Plaintiff.
GARBER & THORNTON,
Att'ys for Defendants.

Endorsed: Filed March 14th, 1876. Thos. H. Reynolds, clerk. By Charles W. Crocker, deputy clerk.

110 *Answer of The Morgan Mining Company.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

The answer of the Morgan Mining Company, one of the defendants, to the bill of complaint of Sumner T. Dunham, complainant. This defendant, reserving to itself all right of exception to the said bill of complaint, for answer thereto, saith:

This defendant says that it does not know that it did, and says that it does not and did not, at the time of the commence-
111 ment of this action claim any right, title, or interest of, in, or to the stock mentioned in the said bill, and this defendant

disclaims all right, title, or interest of, in, or to the stock mentioned in the said bill, and this defendant disclaims all right, title, and interest to said five thousand (5,000) shares of stock, and every part thereof.

And this defendant denies all and all manner of combination and confederacy wherewith it is by the said bill charged without this that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing
112 to aver and maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

GARBER & THORNTON,
Def'ts Attorneys.

D. M. McCLURE, *Of Counsel.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Charles T. Botts, being duly sworn, deposes and says that he is an officer, to wit, the president of the above-named defendant, The Morgan Mining Company; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated on information or belief, and that as to those matters he believes it to be true.

CHARLES T. BOTTS.

Subscribed and sworn to before me, this 1st day of April, A. D. 1876.

[SEAL.] E. H. THARP,
Notary Public.

113 Endorsed: Filed April 1st, 1876. Thomas H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

114 *Answer of Wm. Irvine.*

In the District Court of the Nineteenth Judicial District of the State of California in and for the City and County of San Fran-Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

The answer of William Irvine, one of the defendants to the bill of complaint of Sumner T. Dunham, complainant.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, saith:

I.

He denies that on the 28th day of March, A. D. 1874, or at any other time, this defendant and the Richard H. Sinton men-
115 tioned in said bill were joint or equal owners of the premises described in said bill as the Morgan mine, or of any portion thereof, or of any interest therein; and, on the contrary, this defendant says that the said Sinton never was the owner of an undivided fourth, or of any other proportion, share, or interest of or in said premises, or any part thereof, and never had any right, title, interest, share, or estate of, in, or to the same, or any portion thereof, either jointly or severally, legally or equitably.

And this defendant denies that the legal title to the said premises, or to any portion, part, or share thereof, was taken or was ever held by him in trust for himself and said Sinton, equally or share and share alike, or otherwise, or in trust for said Sinton, to any extent, or in any manner, or at all.

116 And this defendant denies that an undivided one-half of said premises, or any other interest therein was acquired by him and said Sinton, or by their mutual efforts, or at their mutual expense, or for their common or equal benefit, or by, upon, or pursuant to any agreement to acquire the title thereto, or to sell or otherwise dispose of the same, or to equally or otherwise share the profits or losses arising thereupon. And this defendant admits that he held the title to one undivided one-half of said premises in trust for divers persons other than said Sinton, Irvine, and Dunham, as is alleged in said bill; but as to the remaining and other undivided one-half thereof, this defendant says that long prior to said 28th day of March, A. D. 1874, he acquired the same individually and for his own sole and exclusive use and benefit, and that
117 to the acquisition thereof the said Sinton contributed neither effort nor expense, and that the same was not acquired pursuant to, nor was there any agreement between this defendant and said Sinton.

II.

And this defendant denies that upon the said 28th day of March, A. D. 1874, or at any other time, this defendant and the said Sinton made or entered into any agreement in reference to said premses, or any portion, or part, or share thereof by which this defendant agreed to hold an undivided half, or any portion, share, or interest of or in said premises equally or otherwise, for himself and said Sinton, or for said Sinton at all, or in any manner, or to any extent or promises, bound himself whenever said premises should be sold or otherwise disposed of to account to said Sinton, or his heirs, or assigns for one-half or other portion of the net or other pro-
118 ceeds of such sale or disposition, or that any expenses should be paid before division of any proceeds, or that there should be any division, and denies that said premises, or any portion, share, or interest thereof, or therein, were, or ever was, owned by this de-

fendant and said Sinton equally or otherwise, or in trust for the use of said Sinton in any manner whatsoever.

And this defendant further denies that on said 28th day of March, A. D. 1874, or at any other time, he made or entered into any agreement with said Sinton in reference to said premises or any portion thereof, or any share or interest therein, or at all concerning the same, save and except as is hereafter fully set forth and admitted.

III.

And as to the allegations contained in Article 3 of said bill of complaint, this defendant says that he has no information
119 or belief upon the subject sufficient to enable him to answer said allegations, and that this defendant is an utter [stranger] to all and every such matter, and cannot form any belief concerning the same, and therefore he denies that the said Sinton assigned, transferred, or conveyed anything, or his right, title, and interest in anything, to the George P. Thrie mentioned in said bill.

And this defendant denies that he recovered from the corporation mentioned in Article 4 of said bill ten thousand shares of its capital stock, or any number of shares exceeding nine thousand seven hundred and sixty-three shares thereof; and denies that said Thrie became or was entitled to five thousand or any shares of said stock.

V.

120 And as to the allegations contained in Article 5 of said bill of complaint, this defendant says that he has no information or belief upon the subject sufficient to enable him to answer said allegations, and that this defendant is an utter stranger to all and every such matter, and cannot form any belief concerning the same; and therefore he denies that on the 29th day of June, A. D. 1875, or at any other time, the said Thrie conveyed, transferred, or assigned to the plaintiff any right, title, or interest in or to said premises or shares, or that said plaintiff ever became or was vested with any right or interest alleged in said bill to have appertained or belonged to said Sinton, or that this defendant is or ever was the trustee of said plaintiff, or holds or ever held, for the use or benefit of said plaintiff, any share or shares of said stock.

VI.

And this defendant denies that he, with others acting in
121 concert with him, or otherwise, represents, or claims the right to represent in the corporation mentioned in said bill, the majority of its capital stock, or by means thereof, or otherwise, has controlled, or does control, the same, or its business, or elects, was elected such officers thereof as this defendant deems for his interests, or as will obey his demands, or that by his control of said company defendant can or could cause any transfer of said stock, or may, or

might, or does, or did, by his management of said mine, or otherwise, possess the power of raising or depressing the apparent value of said mine at will.

This defendant denies that said stock has no ascertained and market value, or that the damages which the plaintiff suffers by reason of being deprived of said stock herein claimed by him cannot be estimated in any court of law, or that said plaintiff can
122 have no adequate remedy except in a court of equity, or that this defendant will transfer the said stock unless restrained.

And this defendant denies that said Thrie ever was a beneficiary as alleged in said bill, as that at any time defendants had notice of any of the matters or things set forth in said complaint, except such as are herein expressly set forth and admitted.

VII.

And as to the allegation in Article 2 of said bill as follows, to wit: "And the said defendant Irvine thereupon, upon said 28th day of March, A. D. 1874, made and executed to said Sinton his certain instrument and declaration of trust in writing, a copy of which is hereunto annexed, marked Exhibit A, and made part of this complaint." This defendant denies that on said 28th
123 day of March, A. D. 1874, or at any time, he made or executed said instrument or declaration, but on the contrary thereof, this defendant says that on or about the said 28th day of March, 1874, in the city of San Francisco, the said Sinton approached this defendant with the said instrument Exhibit A, already drawn, in his hands, and requested this defendant to execute the same: that in answer to such proposition this defendant positively refused to execute said instrument, and in explanation of such his refusal told said Sinton that he had no right or interest in said premises, and asked said Sinton whether he claimed any right or interest in said premises.

That said Sinton replied that he did not, and that he knew that he had none, but said that there had always existed a great friendship between him and this defendant, and that this defendant had
124 promised him if he made a large amount of money out of said mine, he would do something for him, said Sinton. And this defendant says that at the time of said conversation he was about to go to the Atlantic States, expecting to be absent from California several months, of which said Sinton was well aware, and that during said conversation said Sinton, in order to induce this defendant to sign said instrument, stated to this defendant that he (this defendant) might die on said trip. That thereupon this defendant requested said Sinton to go with him to the office of T. K. Wilson, one of the subscribing witnesses to said instrument, who was then the attorney-at-law of this defendant, and that after finding said Wilson in his office, this defendant, in the presence of said Sinton, handed said instrument to said Wilson, and re-
125 quested him to read the same, and after he had read the

same, stated to said Wilson, in the presence and hearing of said Sinton, that although said Sinton had no right to any portion of said premises, or to any interest therein, yet that, as a mere gratuity, this defendant was willing to sign said instrument upon the express agreement and understanding that when signed the same should be left in the custody and under the control of the said Wilson, with directions, and upon the understanding that it should have no effect whatever, except in the case of the death of this defendant upon said journey, and that in case this defendant should return to California, the said instrument should be returned to this defendant, and that in no event should said Wilson allow said instrument to go out of his hands or part with the custody and control, except the said defendant should die before re-
126 turning to California; that said Sinton thereupon agreed to said terms, and consented that this defendant should sign, and said Wilson should hold, said instrument upon the conditions aforesaid, and so stated by this defendant in his hearing. Defendant further says that thereupon, and upon the express understanding and conditions aforesaid, he did sign said instrument, and did place the same in the hands and custody of said Wilson, with the consent of said Sinton, and that said Wilson had ever since retained the same, and had the custody and control thereof, and that said instrument never was in any manner delivered to said Sinton, and that it never was the intention of this defendant to part with custody, control, and full and absolute dominion of the said instrument, except as hereinbefore specified, and that said Sinton
127 was aware of such the intention of this defendant, and acquiesced therein; and that at the time of the signing of said instrument it was fully understood and agreed by and between this defendant and the said Sinton that no trust was to be or was created by said instrument or by the signing thereof, or by the handing the same to the said Wilson, or the placing thereof in the hands of said Wilson, and that said instrument and the signing thereof and the giving the same to said Wilson and all the acts then performed and all the stipulations then made were to have no greater effect than to enable said Sinton to demand the delivery of said instrument to him, only in the event and upon the contingency that this defendant should not survive said journey and return to
128 California, and that in case he did so survive and return, the said instrument should be delivered up to this defendant, and should be utterly void and of no effect whatever, and that if the defendant did so survive and return, the said premises should absolutely belong to this defendant, and said Sinton should have no right, title, interest, claim, or demand thereto, or to any share or interest therein, but that the title, both legal and equitable, thereto should remain vested in this defendant fully and absolutely, and as the same was vested prior to the signing of said instrument.

And this defendant says that he would not have signed said instrument upon any other terms than those above set forth, and that

if said Sinton had not expressly agreed thereto he would have refused to sign the same. And defendant says that after so signing said instrument he did make said journey, and did return
129 therefrom to California about the month of August, A. D. 1874.

VIII.

And this defendant submits that all and every the matters in the said bill of complaint mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said plaintiff is not entitled to any relief from a court of equity; and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said bill.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this that there is any other matter, cause, or thing in the said bill contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently
130 answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this hon. court shall direct, and humbly prays to be hence dismissed with his costs and charges in this behalf mentioned.

GARBER & THORNTON,
Def'ts' Atty's.

D. M. McCLURE, *of Counsel.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

William Irvine, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing separate answers and knows the contents thereof; that the same is true of his own knowledge except as to the
131 matters therein stated upon information or belief, and that as to those matters he believes it to be true.

WILLIAM IRVINE.

Subscribed and sworn to before me, this 1st day of April, 1876.
[SEAL.] E. H. THARP,
Notary Public.

Endorsed: Filed April 1st, 1876. Thos. H. Reynolds, clerk. By Chas. W. Crocker, deputy clerk.

132 *Petition of Defendants that Cause be Removed to U. S. Circuit Court, Dist. of Cal.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,

vs.

WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

To the honorable the district court of the nineteenth judicial dis. of the State of California in and for the city and county of San Francisco:

The petition of William Irvine, of the city of San Francisco, and of the Morgan Mining Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its office in the city of San Francisco, respectfully shows:

133 That your petitioners are the defendants in this suit, and and that the same was brought by Sumner T. Dunham, plaintiff, on or about the 25th day of February, 1876, in the district court of the nineteenth judicial district of the State of California, to be held in the city and county of San Francisco, in the said judicial district, and that the said plaintiff is and was at the time of the bringing this action a citizen of the State of New York, and that your petitioners are and were at the time of bringing this suit citizens of the State of California.

And your petitioners further respectfully shows that said plaintiff claims in the summons and complaint in this suit five thousand shares of the capital stock of the Morgan Mining Company, and that said stock is worth more than one dollar per share, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

134 And your petitioners further respectfully represent that this suit is brought by said plaintiff against the said defendants, demanding five thousand shares of the capital stock of The Morgan Mining Company of and from the defendant, William Irvine, and demanding that the said defendants, William Irvine and The Morgan Mining Company, be enjoined and restrained until the final determination of this case from assigning or transferring on the books of said company, or otherwise, or allowing to be transferred, capital stock of said corporation standing in the name of said defendant Irvine, so as to leave a less number of shares standing in his name than five thousand shares.

And your petitioners further respectively represent that this suit has not been tried, but that the same is pending for trial in the district court of the nineteenth judicial district of the State of

135 California, in and for the city and county of San Francisco, at the term thereof at which this suit could be first tried, and that your petitioners desire to remove this suit before the trial

thereof into the next circuit court of the United States, to be held in the district of California, in the ninth circuit court, in pursuance of the provisions of law, as contained in the act of Congress, approved March third, one thousand eight hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

And that they are ready and willing to give such good and sufficient security as may be required for doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and they offer herewith

136 their bond, executed by George Irvine, of the city of San Francisco, as surety, in the penal sum of two thousand dollars conditioned that your petitioners shall enter in the next circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its session, a copy of the record in this suit, and shall pay all costs that may be awarded by the said circuit court if such court shall hold that such suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, and shall do such other appropriate acts as by the said act of Congress, approved March 3d, 1875, are required to be done upon the removal of a suit into the United States court as good and sufficient surety, according to the said provisions of law, upon the removal of a suit into the United States court.

137 And your petitioners therefore pray that the said bond may be accepted as good and sufficient surety, according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States, to be held in the district of California, in the ninth circuit, pursuant to the statute of the United States, *to be held in the district of California, in the ninth circuit, pursuant to the statute of the United States* in such case made and provided, and that no further proceedings may be had thereon in this court.

And your petitioners will ever pray.

[SEAL.] MORGAN MO. COMPANY.
By CHAS. BOTTS, *Presid't.*
WILLIAM IRVINE.
CHAS. BOTTS,
Pres't Morgan Mining Co.
D. M. McCLURE,
Of Counsel.

GARBER & THORNTON,
Attorneys for Defendant.

138 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

William Irvine, one of the petitioners in the foregoing petition,

being duly sworn, says that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true, and further saith not.

WILLIAM IRVINE.

Subscribed and sworn to before me, this 27th day of April, 1876.
[SEAL.] JAS. L. KING,
Notary Public.

139 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Charles T. Botts, being duly sworn, deposes and says, that he is the president of the Morgan Mining Company, the corporation defendant herein, and that he makes this affidavit on behalf of said corporation defendant, and that he has read the foregoing petition to which he has subscribed the name of said corporation, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

CHAS. T. BOTTS.

Subscribed and sworn to before me, this 27th day of April, 1876.
[SEAL.] JAMES L. KING,
Notary Public.

140 *Bond on Removal of Cause.*

In the District [Court] of the Nineteenth Judicial District of the State of California in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

We, William Irvine, of the city of San Francisco, in the State of California, and the Morgan Mining Company, a corporation, organized and existing under and by virtue of the laws of the State of California, as principals, and George Irvine, of the city of San Francisco, as surety, are held and firmly bound unto Sumner T. Dunham, of New York, in the sum of two thousand dollars, lawful money of the United States of America, to be
141 paid to the said Sumner T. Dunham, his successors or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators firmly by these presents.

Sealed with our seals, dated the 27th day of April, A. D. 1876.

Whereas a suit was brought on or about the 25th day of February, A. D. 1876, in the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco by the said Sumner T. Dunham against the said

William Irvine and the Morgan Mining Company, and the same is now pending for trial in said court in the said city and county of San Francisco, and is removable into the circuit court of the United States in the District of California, in the ninth circuit, under the act of Congress, approved March third, eighteen
142 hundred seventy-five, entitled An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes. And whereas the said William Irvine and the Morgan Mining Company have filed their petition in the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, for the removal of said suit into the next circuit court of the United States, to be held in the district of California, in the ninth circuit: Now, therefore, the condition of the above obligation is such, that if the above-bounden William Irvine and the Morgan Mining Company shall enter in the next circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its session,
143 a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if such court shall hold that said suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit if special, was originally requisite therein, and shall do such other appropriate acts as by the said acts of Congress, approved March third, A. D. 1875, are required to be done upon the removal of a cause into the United States courts, then the above obligation to be void, otherwise to remain in full force and virtue.

GEORGE IRVINE. [SEAL.]
WILLIAM IRVINE. [SEAL.]
MORGAN MINING COMPANY. [SEAL.]
By CHAS. T. BOTTS, *President.* [SEAL.]

144 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

George Irvine, the surety in the foregoing obligation named, being duly sworn, deposes and says, that he is a resident of the State of California and a householder therein, and is worth the sum of two thousand dollars over all his just debts and liabilities, and exclusive of property exempt from execution.

GEORGE IRVINE.

Subscribed and sworn to before me, this 27th day of April, 1876.
[SEAL.] JAMES L. KING,
Notary Public.

STATE OF CALIFORNIA, *City and County of San Francisco:*

I certify that on the 27th day of April, A. D. 1876, before me personally appeared William Irvine and George Irvine, to me
145 known to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me

that they executed the same as their own free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal.

[SEAL.] JAMES L. KING,
Notary Public.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

I certify that on this 27th day of April, A. D. 1876, before me personally appeared Charles T. Botts, to me known to be the president of the Morgan Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, whose names subscribed to the annexed instrument, who is personally known to me to be the individual described in
146 and who executed the same, the said Morgan Mining Company being named in the said instrument, known me to be the corporation described therein and that executed the same as a party thereto, and acknowledged to me that he executed the same freely and voluntarily as such president, and as and for the act and deed of the said the Morgan Mining Company, and that said corporation executed the same for the uses and purposes therein mentioned, and that the seal which is thereto affixed is the seal of said corporation, and was thereto affixed by authority thereof.

Witness my hand and official seal.

[SEAL.] JAMES L. KING,
Notary Public.

147 *Bond.*

In the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.

Charles T. Botts, being duly sworn, deposes and says that the Morgan Mining Company, one of the defendants, is a corporation organized and existing under and by virtue of laws of the State of California, and that this defendant is the president of the said corporation defendant; that on the 30th day of March, A. D. 1876, the trustees of said corporation duly and legally passed a
148 resolution in the following words:

Resolved, That this company desires to remove, and shall remove, the case of Sumner T. Dunham *vs.* William Irvine and The Morgan Mining Company from the district court of the nineteenth judicial district of the State of California into the circuit court of the United States for the district of California, and that the president of the company and Messrs. Garber and Thornton, attorneys, be, and they are, authorized and instructed to do all things for and in name of the company necessary and proper to said removal.

And deponent says that he has signed the name of the corporation to said petition and bond, and has affixed to said petition and bond the seal of the corporation.

CHAS. T. BOTTS.

Subscribed and sworn to before me, this 27th day of April, 1876.

[SEAL.] JAMES L. KING,
Notary Public.

149 *Certificate of Clerk.*

I, Thomas H. Reynolds, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the nineteenth district court, in and for said city and county, hereby certify the foregoing to be full and true copies of complaint, summons, undertaking, and writ of injunction, stipulation, answer of Morgan Mining Co., answer of William Irvine, petition, bond, and notice of removal to United States circuit court, No. 2, now remaining on file in my office.

Attest my hand and seal of said court, this 25th day of May, A. D. 1876.

[SEAL.] THOMAS H. REYNOLDS, *Clerk.*
By W. STEVENSON, *Deputy Clerk.*

Endorsed: Filed April 28, 1876. Thos. H. Reynolds, clerk. By Colin M. Boyd, deputy clerk.

150 In circuit court of the United States, ninth circuit, district of California. Transferred papers. Filed June 17th, 1876. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep. cl'k.

151 *Replication of Complainant.*

In the Circuit Court of the United States for the ninth circuit and district of California.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants. } No. 1614.

The replication of Sumner T. Dunham, the complainant, to the separate answer of William Irvine, one of the defendants herein.

The repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver
152 and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matter, and things this repliant is, and will be,

ready to aver and prove as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

Dated San Francisco, July 1st, 1876.

WILSON & WILSON,
Solicitor for Plaintiff.

Endorsed: Service of a copy of the within replication is hereby admitted this 1st day of July, A. D. 1876. Garber and Thornton and D. M. McClure, solicitors and att'ys for defendants.

153 Endorsed: Filed July 1st, 1876. L. S. B. Sawyer, clerk. By J. F. OBeirne, dep. cl'k.

154 *Replication of Sumner T. Dunham.*

In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Plaintiff,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants. } No. 1614.

The replication of Sumner T. Dunham, the complainant, to the separate answer of the Morgan Mining Company, one of the defendants herein.

The repliant, saving and reserving unto himself all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and
155 prove his said billl to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and unsufficient to be replied into by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

Dated San Francisco, July 1st, 1876.

WILSON & WILSON,
Solicitors for Plaintiff.

Endorsed: Service of a copy of the within replication is hereby admitted, this 1st day of July, A. D. 1876. Garber & Thorn-
156 ton and D. M. McClure, solicitors for defendants. Filed July 1st, 1876. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep. clk.

157 *Enrollment.*

At a stated term of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, held at the court room thereof, in the city and county of San Francisco,

in said district, on Wednesday, the 24th day of December, A. D. 1879.

Present: Honorable Lorenzo Sawyer, circuit judge.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

The above-entitled suit was originally instituted in the district court of the 19th judicial district of the State of California, in and for the city and county of San Francisco, on the 25th day of February, A. D. 1876, and afterwards transferred to said circuit
158 court. The certified copies of pleadings and proceedings in which suit, and hereto annexed, were filed in said circuit court on the 17th day of June, 1876.

The defendants appeared herein by Messrs. Garber, Thornton and McClure, as their solicitors.

On the 1st day of July, 1876, two separate replications were filed, and are hereto annexed.

On the 29th day of April, A. D. 1878, an interlocutory decree was filed and entered herein in the words and figures following, to wit:

Interlocutory Decree.

In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Complainant, *vs.* WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants.	No. 1614. In Equity. February Term, A. D. 1878.

159 This cause came on to be heard at the July term of this court last, and was argued by counsel and taken under advisement by the court, and the same having been duly considered, thereupon on such consideration it was at this term of the court ordered, adjudged, and decreed as follows, viz:

That the defendant William Irvine was, at the time of the filing of the bill of complaint herein, and still is, the trustee of and for the complainant, and held, and still holds, as such trustee for the use and benefit of the complainant the one-half of nine thousand nine hundred and ninety-four (9,994) shares of the capital stock of the Morgan Mining Company, referred to in the complaint, the said shares being the gross proceeds received by said defendant Irvine for and as the consideration of a conveyance and disposition
160 by him to said mining company of the one-half of the mining property called the "Morgan Mine," referred to in the said declaration of trust, dated March 28th, A. D. 1874, mentioned and described in the bill of complaint herein; said one-half of said capital stock so held by said defendant Irvine in trust for the complainant, being, however, subject to a claim of the said defendant Irvine against the same for one-half of all necessary expenses referred to in said declaration of trust; and it is ordered that it be referred to

L. S. B. Sawyer, Esq., as a master, to take and state on account of all the necessary expenses, including counsel fees, before the twenty-eighth (28th) day of March, A. D. eighteen hundred and seventy-four, (1874), incurred, or thereafter incurred, in and about said property by said defendant Irvine, up to the time of the conveyance of said property by said Irvine to said Morgan Mining Company, and in
161 taking said account the said Master shall make unto said complainant all just allowance as well for moneys paid by him as by his assignors or grantors, George P. Thrie and Richard H. Sinton, or other persons by their or either of their request, or by their or either of their procurement to said Irvine, or at his request, for the benefit of said mining property referred to in said bill of complaint, and the Master shall make all just allowances to said defendant Irvine, and the Master shall state what, upon the balance of said accounts, shall be due from the complainant to said defendant Irvine. And in taking and stating the account before said Master, either of the parties are at liberty to use any of the evidence heretofore taken in this case, and to introduce other evidence. And the Master is to make his report touching the matters hereby referred to him
162 with all convenient speed.

And upon the coming in of the Master's report, and the payment by the complainant to said Irvine of the amount determined by the court to be due the said defendant upon said accounting, it is ordered that the said defendant Irvine, do assign and transfer to said complainant four thousand nine hundred and ninety-seven (4,997) shares of the said capital stock of said Morgan Mining Company, and that said company do cause the same to be transferred upon the books of said corporation to the said complainant.

And it is further ordered, that the injunction formerly granted in this cause be continued, staying the transfer of said four thousand nine hundred and ninety-seven (4,997) shares of said capital stock of said Morgan Mining Company to any one other than
163 complainant. And the court doth reserve the consideration of all further directions until the said Master shall have made his report, and any of the parties are at liberty to apply to the court as occasion may require.

(Signed) LORENZO SAWYER, *Circuit Judge.*

Endorsed: Filed and entered April 29, 1878. L. S. B. Sawyer, clerk.

164 *Notice of Motion for Rehearing.*

In the Circuit Court of the United States, Ninth Circuit, District, of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants.

To Messrs. WILSON & WILSON, *Solicitors for Complainant.*

GENTLEMEN: You will please take notice that on Monday the

twelfth day of August, A. D. 1878, at the court room of said court, in the city of San Francisco, on the opening of the court, or as soon thereafter as counsel can be heard, we will move said court to grant to the defendant, William Irvine, a rehearing upon the in-
165 terlocutory decree filed and entered in this court on the 29th day of April, 1878.

Said motion will be based upon the papers on file in said cause, and upon the petition and affidavit, copies of which are hereto annexed.

GARBER & THORNTON,
Solicitors for Defendants.

166 *Petition for Rehearing.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants.

The petition of the above-named defendant, William Irvine, respectfully showeth:

That by the interlocutory decree, filed and entered in this cause on the 29th day of April, 1878, he, the said defendant, has been greatly aggrieved in this:

1. Amongst other things, said decree adjudges that the
167 said defendant was, at the time of the filing of the complaint herein, and still is, the trustee for the complainant, and held, and still holds, as such trustee, for the use and benefit of the complainant, four thousand nine hundred and ninety-seven shares of the capital stock of the Morgan Mining Company, and an account is directed to be taken between the said defendant and the complainant as trustee *cestui que trust.*

The complainant sues as the assignee of Richard H. Sinton, and alleges that the property in controversy was obtained by the joint labor and at the joint expense of the said Sinton and the said defendant Irvine.

It is upon the testimony of Sinton that the complainant relies. Sinton testifies that the defendant Irvine purchased the property at sheriff's sale on the 28th day of December, 1869, and re-
168 ceived the sheriff's deed therefor on the 29th day of June, 1870; that in the month of July, 1870, he, Sinton, commenced a negotiation with Irvine on behalf of Fair and Seloner for the conveyance to them (Fair and Seloner) of this property; this negotiation, he says, was continued until the fall of 1872, when it was finally broken off. He says that if Fair and Seloner had purchased, he expected to get one-half of Seloner's interest; that after the failure of the negotiation, Irvine made him a verbal promise, without consideration, that he would give him the same interest in the property that he would have had if Seloner and Fair had

purchased. So the matters stood on the 28th day of March, 1874, when Irvine signed the document, Ex. A, that is called the "Declaration of Trust."

169 Sinton testifies that he has never given any consideration for the interest claimed by his assignee, the complainant.

The pleadings and the complainant's testimony present the single issue: Was the execution of this document, the so-called declaration of trust, completed by delivery? This declaration or trust, upon Sinton's testimony, was equivalent to a deed of gift. Was it delivered and irrevocable?

Sinton says that he asked Irvine to give him the document, and he positively refused to do so. Finally, the paper was delivered, as Sinton himself says, "in escrow," to Mr. T. K. Wilson, with whom it remains. It never has been in the possession either of Sinton or his assignees.

Irvine, the defendant, and T. K. Wilson testify that the document was to be delivered to Sinton only in the event that
170 Irvine, who was about to go abroad, should die before his return to California. Sinton says it was left with Wilson, for the mutual benefit of Irvine and himself. But Sinton also says that the reason Irvine gave for refusing to let him have this document was, that he was afraid Sinton's interest would be gobbled up by his creditors.

The remainder of complainant's testimony only tends to prove, that prior to the 24th of March, 1874, Irvine said that Sinton had an interest in the property.

This is the strongest light in which the complainant's case can possibly be put; and your petitioner is advised, that upon the facts as they are testified to by complainant's witnesses, the interlocutory decree, which adjudges that the defendant, Irvine, holds the property in trust for the complainant, should be reversed.

171 2. That whereas it appears from the evidence in this cause, that upon the 29th day of June, 1870, the said William Irvine, your petitioner, was the sole owner of the mining property in the complainant's bill, from the conveyance of which to the Morgan Mining Company, said shares of stock accrued, the said defendant is advised that said decree is abortive and erroneous, in that it does not adjudge when and how said trust arose.

3. That whereas, by said decree the Master is directed to take and state an account of all the necessary expenses, including counsel fees, incurred in and about said property by said defendant, Irvine, before the 28th day of March, 1874, as well as those incurred thereafter, up to the time of the conveyance of said
172 property by said defendant, Irvine, to said Morgan Mining Company; and whereas large sums of money have been expended by the said defendant, Irvine, in and about the necessary care and preservation of the property, which he is so adjudged to have held, and to be holding, in trust for the complainant, since the

date of said conveyance, as will appear by the affidavit hereto annexed.

Your petitioner is advised that the said decree is erroneous in that it limits the accounting to said period, and does not direct the said master to make allowance to said adjudged trustee for all sums necessarily expended in and about the care and preservation of the trust fund up to the time of said accounting.

4. Whereas said decree directs that the said master shall
173 make unto said complainant all just allowances, as well for all moneys paid by him as by his grantors or assignors, George P. Thrie and Richard Sinton, or by other persons by their, or either of their, procurement to said Irvine, or at his request, for the benefit of said mining property referred to in said bill of complaint. Your petitioner is advised that such order or decree is erroneous in that it is uncertain whether such payments are to be limited to the period during which the said defendant has held the said property in trust for the complainant and his assignors, or whether the said master is to make an allowance to the complainant for such sums as he or his assignors may have procured to be paid for the benefit of said property before he or they had any interest in it.

Moreover the phrase "money paid for the benefit of prop-
174 erty," is ambiguous, uncertain, and unintelligible.

And your petitioner shows that the argument in said cause was heard by the circuit judge only upon briefs, and he now most respectfully asks that an oral argument may be had whereby the questions of law and fact, numerous, important, and complicated as they are, may be more fully and satisfactorily discussed before said circuit judge, and the associate justice of the supreme court.

Wherefore, your petitioner humbly prays that a rehearing may be granted him upon the whole merits of the case, which are virtually described in said interlocutory decree, and that upon such rehearing said decree may be reversed, altered, or modified as to this honorable court may seem meet and proper. And
175 that in the meantime an order may be made staying any further proceedings upon said interlocutory decree until the further order of this court.

And your petitioners will ever pray, &c.

C. T. BOTTS.
WILLIAM IRVINE.

In the Circuit Court of the United States, Ninth Circuit District of California.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE, *et al.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

William Irvine, being first duly sworn, deposes and says that

he is one of the defendants in the above-entitled cause, and is the person whose name is signed to the foregoing petition.

176 Since the 9th day of April, 1875, the date of his conveyance to the Morgan Mining Company, he has paid on account of assignments duly and lawfully levied by said corporation on the four thousand nine hundred and ninety-seven shares of the capital stock of said corporation, which he has been adjudged to hold in trust for the complainant, the sum of twelve thousand five hundred and five dollars and 90 cents, in gold coin of the United States.

WILLIAM IRVINE.

Subscribed and sworn to before me, this 31st day of July, 1878.
[SEAL.] T. W. TALIAFERRO,
Notary Public.

Endorsed: We hereby acknowledge service of the within, waiving nothing. Wilson and Wilson, att'ys for pl'ff. Filed August 1st, 1878. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

177 *Enrollment.*

On the first day of August, A. D. 1878, a petition for rehearing upon said decree was filed and is hereto annexed.

On the 20th day of August, A. D. 1878, an order was made and entered herein, in the words and figures following, to wit:

At a stated term of the circuit court of the United States of America, for the district of California, held at the court room, in the city and county of San Francisco, on Tuesday, the 20th day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge.

SUMNER T. DUNHAM *vs.* MM. IRVINE *et al.*

178 *Order that Interlocutory Decree be Amended, &c.*

This cause heretofore argued and submitted to the court for consideration and decision, upon the petition for a rehearing herein, having been duly considered, it is ordered that said petition be, and the same hereby is, denied.

On motion of Mr. Garber, of counsel for defendants, S. M. Wilson appearing on behalf of complainant, it is ordered that the interlocutory decree herein be amended by inserting in the fourth line of the third page thereof, after the words "Mining Company," the following: "And that said Master further ascertain and report what amount of assessments, if any, have been paid by said Irvine on said shares of mining stock since said conveyance to said Morgan Mining Company, and report such facts relating to said payment as may be necessary for the information of the court, the

question of the liability of the complainant for the payment
179 of said sums so paid for assessments being reserved for consideration on the coming in of said Master's report."

I hereby certify that the foregoing is a full, true, and correct copy of an original order entered in the above-entitled action.

Attest my hand and seal of said circuit court this 27th day of Dec'r, A. D. 1879.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

180 In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California

SUMNER T. DUNHAM
vs.
WM. IRVINE *et al.* } In Equity.

On motion of Mr. Garber, of counsel for defendants, S. M. Wilson appearing on behalf of compainant, it is ordered that the interlocutory decree entered herein be amended by inserting in the fourth line of the third page thereof, after the words "Mining Company," the following: "and that said Master further ascertain and report what amount of assessments, if any, have been paid by said Irvine on said shares of mining stock since said conveyance to said Morgan Mining Company, and report such facts relating
181 to said payment as may be necessary for the information of the court, the question of the liability of the complainant for the payment of said sums so paid for assessments being reserved for consideration by the court on the coming in of said Master's report."

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Endorsed: Filed August 20th, 1878. L. S. B. Lawyer, clerk. By J. F. O'Beirne, lep'y cl'k.

182 *Master's Report.*

In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the District of California.

SUMNER T. DUNHAM
vs.
WILLIAM IRVINE *et al.* } In Equity. No. 1614.

To the honorable the circuit court of the United States of the ninth judicial circuit in and for the district of California:

In pursuance of an interlocutory decree of this honorable court filed and entered in the above-entitled cause on the 29th day of April, A. D. 1878, and an order amending said interlocutory
183 decree filed and entered on the 20th day of August of the same year, I, the subscriber, one of the Masters of this

court, residing in the city of San Francisco, district aforesaid, having been attended at several times by counsel for the complainant and for the defendants, and having examined the evidence heretofore taken in this cause, and also the evidence of several witnesses produced in this behalf, upon the matters directed to be inquired into by said decree, and considered the same as to such part of the decree as directs an account to be taken of all the necessary expenses, including counsel fees, before the 28th day of March, A. D. 1874, incurred or thereafter incurred in and about the property in said decree mentioned by said defendant Irvine up to the time of the conveyance of said property to the Morgan Mining Company, to wit, April 9, 1875, I do report that de-
184 fendant Irvine presents his account, claiming $50,261.22. (See Exhibit Account of Expenditures made by Defendant Irvine.)

This consists of debits	$52,519 40
And deducts credits	2,258 18
	$50,261 22

This account can be divided into three classes of charges:
1st. Disbursements by Irvine, including assessments paid.
2d. Salary of Irvine.
3d. Interest claimed.

First as to general disbursements:

These amount from the beginning of the account, July 9th, 1870, to December 31st, 1874, as footed up on page 2 of the account, to $7,264.78.

Now, on the 14th day of April, 1873, Irvine made a compromise with Bacon and others, whom we shall call Bacon & Co.,
185 by which the latter were recognized as half owners in the mine, and they were to pay all the expenses of applying for and obtaining the patent, and necessarily half of the expenses of taking care of the mine.

We must then divide the expenses prior to the 14th of April, 1873, between Irvine and Dunham, and after that date all the expenses of applying for and procuring the patent must be borne by Bacon & Co., and the balance be divided between Bacon & Co. and Irvine and Dunham.

Reforming the accounts on these principles, we arrive at the following results:

186	Keeper's wages, April 14th, 1873	$2,559 00
	Other items of the account before that date	1,185 68
		$3,744 68
	Disbursements prior to April 14th, 1873, one-half of which is chargeable to Dunham, viz	$1,872 34

Subtracting from said		$7,264 78
the whole sum of disbursements, the disbursements prior to April 14th, 1873		3,744 68
And we have		$3,520 10
Disbursements subsequent to April 14th, 1873. This includes the expenses of the patent to be paid by Bacon & Co., which Irvine's two bills rendered Bacon, put at		2,017 15
which being deducted, leaves		$1,502 95
A balance chargeable to all the mine owners, Bacon & Co. one-half, and Irvine and Dunham half, or one-quarter to Dunham, viz		$375 74
for outlays after April 14th, 1873. Add to this the one-half of disbursements prior to April 14th, 1873		1,872 34
And we have a total chargeable against Dunham of		$2,248 08
187 Deducting from the last-named amount, viz		$2,248 08
the amounts paid by Sinton and Fair, (see testimony, pp. 71 and 375)	$400 00 510 25	
and amounts paid by Brown, (see testimony, pp. 231–2)	950 00 198 50	
		2,058 75
Leaves a balance due from Dunham of		$189 33

As to such part of the decree as directs me to ascertain and report what amount of assessments, if any, have been paid by said Irvine on the shares of mining stock of said company since said conveyance to said Morgan Mining Company, and report such facts relating to said payment as may be necessary for the information of the court, the question of the liability of the complainant for the payment of said sums so paid for assessments, being reserved for consideration by the court on the coming in of the master's report,

I do report that the following amounts were paid by said
188 Irvine on said shares of mining stock at the following dates, viz:

1875.		
May 31.	Assessment No. 1, 50c. per share on 9,994 shares	$4,997 00
1876.		
Feb. 29.	Assessment No. 2, 50c. per share on 9,994 shares	4,997 00
1877.		
March 12.	Assessment No. 3, $1.00 per share on 9,994 shares	9,994 00
1878.		
July 27.	Assessment No. 4, 50c. per share on 9,994 shares	4,997 00
	Total	$24,985 00

Only two assessments were paid before March 10th, 1877. At that date the complainant offered to pay them, and afterwards as each became due, offered to pay them. (See Code Civ. Pro., 2074, and Notices in Evidence, marked Exhibits A, B, and C.)

In taking and stating this account, I have not allowed defendant Irvine any interest. This case does not, in my opinion, fall within the cases in which interest is given by the Code. (Civil
189 Code, Sec. 1912 to 1920.)

Nor have I allowed defendant Irvine any salary. The declaration of trust contains no reference to salary, and does not contemplate it. I take the rule of law to be that one joint owner, or partner, cannot charge his co-owner a salary or compensation for taking care of the joint property.

The account rendered Thrie contains no item of salary; nor did the earlier bills rendered Sinton, nor the later ones paid by Thomas Brown. Besides the evidence shows that Sinton gave his services as well as Irvine.

The decree does not allow salary.

No proof of value of services was made.

All which is respectfully submitted.

Dated San Francisco, April 30th, 1879.

L. S. B. SAWYER, *Master in Chancery.*

Endorsed: Filed 30 April, 1870. L. S. B. Sawyer, clerk.

190 U. S. Circuit Court.

SUMNER T. DUNHAM, *vs.* WILLIAM IRVINE *et al.* } In Equity.

Depositions upon examination on accounting before L. S. B. Sawyer, Esq., Master in Chancery.

WEDNESDAY, *July* 17*th*, 1878.

Present: Mr. Wilson, of counsel for complainant; Mr. Botts, of counsel for defendant.

Counsel for complainant offers in evidence the testimony heretofore taken, and now on file in this cause, referring to the payments and disbursements made by the several parties.

191 The hearing is then continued until Tuesday, 23d instant, at half past ten o'clock a. m.

TUESDAY, *July* 23*d*, 1878.

Present: Mr. Wilson, of counsel for complainant.

Counsel on behalf of defendant not appearing, a further continuance is taken until Monday, 29th instant, at two o'clock p. m.

MONDAY, *July* 29*th*, 1878.

On account of the absence from the city of Mr. Wilson, counsel for complainant, the hearing is further continued until Monday, August 5th, at two o'clock p. m.

192 MONDAY, *August* 5*th*, 1878.

Further continued, by counsel, until Monday, 12th instant, at 2 o'clock p. M.

MONDAY, *August* 12*th*, 1878.

Further continued, at request of counsel for defendant, till Monday, 19th instant, at two o'clock p. m.

MONDAY, *August* 19*th*, 1878.

By consent, a further continuance is taken until Friday, 23d, at two p. m.

FRIDAY, *August* 23*d*, 1878.

Further continued, by consent, until Friday, 30th instant,
193 at two o'clock p. m.

FRIDAY, *August* 30*th*, 1878.

Further continued, by consent, until Friday, September 6th, at two o'clock p. m.

FRIDAY, *September* 6*th*, 1878.

Further continued, at the request of counsel for defendant, till to-morrow, 7th instant, at two o'clock p. m.

SATURDAY, *September* 7*th*, 1878.

Present: Mr. Wilson, of counsel for complainant; Mr. Botts, of counsel for defendant.

Mr. Botts offers in evidence an account of expenditures
194 made by defendant for and on account of the Morgan mine, endorsed "Acc't presented before the examiner, upon examition of Irvine, September 7th, 1878."

Deposition of William Irvine.

Examination-in-chief of WILLIAM IRVINE by Mr. Botts:

Question 1. Mr. Irvine, will you look at the paper marked "Account of the expenditures made by Irvine—ac. presented before

the examiner upon the examination of Irvine, September 7th, 1878," and tell me if you recognize the paper?

Answer. (After examination.) Yes, sir; I recognize the paper.

Q. 2. Was that account made out by you, sir?

195 A. Yes, sir.

Q. 3. Did you actually make all the disbursements which appear from this document to have been made by you?

A. Yes, sir.

Q. 4. And at the dates as stated there?

A. Well, as near as I can get at it; they might vary a day or the like of that, but they are substantially correct.

Cross-examination by Mr. WILSON:

Question 1. On the 14th day of April, 1873, you made a contract with Bacon on behalf of himself and those whom he represented in reference to the mine?

196 Answer. Yes, sir.

Q. 2. By that contract you recognized him and his party as half owners in the mine?

A. Yes, sir.

Q. 3. And from that period of time the disbursements made on account of the mine, as represented in the account presented here to-day, were made on behalf of Bacon and his company, as to one-half of the mine?

A. Yes, sir.

Q. 4. Then, of the expenditures made on account of the mine subsequent to that 14th day of April, 1873, you propose to charge the complainant in this action only the one-quarter?

A. Outside of the assessments they would be half.

197 Q. 5. I speak of the expenditures made on the mine up to the time of the incorporation?

A. Yes, sir; just one-quarter.

Q. 6. Referring to the items of June 11th, in that account "paid Tilden & Wilson on contract, $50." Have you a voucher for that?

A. Yes, sir.

Q. 7. Will you please produce it?

A. I haven't it here.

Q. 8. What was that charge?

A. It was for drawing the contract of April 14th, 1873, for drawing the contract itself.

Q. 9. The item of the 23d of July—J. A. Foster $3.50—what was that?

198 A. That was expense incurred in regard to getting copies of papers and the filing of papers, &c., in getting the patent. Mr. Foster was the county clerk of Calaveras county.

Q. 10. "Lindsay, notary fees, $2.50;" what was that for?

A. That was for taking the acknowledgements of the gentlemen who posted the notices as required by law.

Q. 11. That was also in reference to the patent?

A. That was also in reference to the patent.

Q. 12. Have you vouchers for those items?

A. I have not.

Q. 13. You are certain you paid those?

A. I could not have got it without.

199 Q. 14. "July 23d, cash paid Russell for buggy hire, $16;" what was that?

A. That was the time I went up to get the business all straightened out; that is, to get the men to make affidavits that they saw the notices posted, &c.

Q. 15. That was also in reference to the patent?

A. Yes, sir.

Q. 16. And the feed and toll, $9, was a part of the expenses of the same trip?

A. Yes, sir.

Q. 17. "William Bickle and William Lyman, $5 each; what was that for?

A. They were the gentlemen who went up with us and posted the notices, and sixty days afterwards went over to Angel's

200 and made affidavit that they saw them.

Q. 18. That was in reference to the patent?

A. Yes, sir.

Q. 19. "Copy of papers, Supreme Court, $12." That was that?

A. I don't remember what that was; I think it was on the dismissal of the suits. I think the item was in reference to the obtaining of the patent, and for the purpose of the patent.

Q. 20. What is this—"Cash paid for five acres of land—mine 25?"

A. That is the Government price paid for the land. There was five acres in the mine under the survey. That is the mine itself.

Q. 21. That is the amount of purchase-money paid for the land embraced in the patent?

201 A. Yes, sir.

Q. 22. "Notary's fees, $1"; what is that?

A. Some acknowledgment of some of the papers; I don't remember.

Q. 23. In reference to the same business?

A. In reference to the same business.

Q. 24. "October 1st—expenses—trip to Carson, $56.50." What was that?

A. Expenses of going from here to there and returning. I suppose the old original bill will tell what the items were. It was all in reference to the patent. I had no other business there. I will tell you exactly what it is (refers to memorandum.) Trip to Carson to pay and discharge the keeper of the mine, and reduce his wages.

202 Q. 25. "December 31st, paid taxes for 1874, $49.50." Was that paid by you?

A. Yes, sir.

Q. 26. Taxes on the mine?

A. Taxes on the mine, yes, sir.

Q. 27. Have you the tax receipt for that?

A. The chances are I have; I am not positive; I expect I have.

Q. 28. That was embraced in your account with Bacon?

A. Yes, sir.

Q. 29. "Sundry expenses, incorporating, examining title, notary fees, &c., $51." Was that embraced in your account with Bacon?

A. No, sir; because that was not in at the time this ac-

203 count was made out; that was just before the incorporation.

Q. 30. Why did you not make the incorporation pay that?

A. They paid the half of it.

Q. 31. I mean the corporation itself; the corporation should have paid the whole of that.

A. I had put up the money; there was no funds in the corporation.

Q. 32. Then that is a proper charge against the entire concern?

A. Yes, sir.

Q. 33. And of that fifty-one dollars, then, the complainant in this action is only to be charged one quarter?

A. Mr. Bacon has paid one half of that.

Q. 34. Then half of that is embraced in that credit to Bacon?

204 A. Yes, sir.

Q. 35. "December 31st, cash paid keeper of Morgan mine, from July 19th, 1870, to April 14th, 1873, 853 days, at $3 per day, $2,559." That brings it up to the date of the compromise with the Bacon party. Who was that keeper, or rather, that series of keepers?

A. There were several.

Q. 36. Did you pay that amount?

A. Yes, sir.

Q. 37. At that time?

A. Yes, sir.

Q. 38. Have you vouchers for those payments?

A. I expect I have; I have got some of them, I know.

205 Q. 39. Were these keepers in there the entire time?

A. All the time.

Q. 40. And is that what you paid them; three dollars a day?

A. At that time I paid three; before that, I paid five.

Q. 41. During this period you paid three.

A. Yes, sir.

Q. 42. You are positive that you paid that?

A. Oh, of course I am.

Q. 43. "Paid keeper of mine from April 14, 1873, to September 14, 1874, 442 days, at $3 per day, $1,326." That was paid after the compromise with Bacon?

A. Yes, sir.

206 Q. 44. And half of that amount is chargeable to the Bacon party?

A. Yes, sir; that is a portion of the $1,485.65, as credited.

Q. 45. Cash paid ditto, September 14th, 1874, to October, 1874,

17 days, at $3 a day, $51." That is for keeper's fees also, and falls under the same rule as the last item?

A. Just the same.

Q. 46. You have here "Cash paid keeper from October 1st, 1874, to May 1st, 1875, 182 days, at $1 a day, $182." That runs up past the time of the incorporation, which was the 12th of March, 1875?

A. The corporation did not take possession of the mine, and did not come up there at all, and I left the keeper to hold possession of the property until the corporation should go up there and take possession.

207 Q. 47. That one hundred and eighty-two dollars was also proper charges against Bacon and his party to the extent of one half, and was included in the account against him?

A. Yes, sir.

(Obj. The item of interest, $4,068.28, charged under date of December 31st, is not admitted by the complainant, who claims that it is a question of calculation, and should be reserved for argument before the master.)

Q. 48. The item charged under the head of "salary for services and time" is a charge for your own services, is it?

A. As an off-set, under the contract.

Q. 49. It is a charge for your own services?

A. Yes, sir.

208 Q. 50. These several items of salary that are charged from month to month are for your own services?

A. Yes, sir.

Q. 51. You had no agreement with the complainant, or with any of his predecessors, in reference to any charge for services?

A. No, sir.

Q. 52. Have you your assessment receipts for these different assessments paid?

A. I have no receipt. They never issued any receipts. The books of the company show exactly what was paid.

Q. 53. Did you take these payments from the books of the company?

A. Yes, sir.

Q. 54. And have these assessments been paid by you?

209 A. Yes, sir.

Q. 55. How were they paid by you; in cash?

A. In gold coin.

Q. 56. Each of these four assessments?

A. Yes, sir.

Obj. Mr. WILSON: We object to the charges for services, the charges of salary, and all charges for services in obtaining the patent, and also to the charges of interest, as severally contained in this account, on the ground that the same are not properly chargeable against the complainant. We also object to the items of as-

sessment as not embraced within the agreement referred to in the complaint, and as not embraced within the decree of the court.

210 Re-direct examination by Mr. BOTTS:

Question 1. Mr. Irvine, is the sum which you have charged here for services and time in managing the property a fair and reasonable compensation for the services you did render?

Answer. I think it is very cheap; I could not have devoted my time to it for that salary if I had not been engaged in doing some other business.

Q. 2. I see that you have charged in this account "To services in obtaining patent to mine, under contract of April 14th, 1883, $1,005\frac{15}{100}$;" will you explain what the nature and character of those services were, and how and in what manner you conceive that you are entitled to charge them?

211 A. Under the contract of April 14th, 1873, with Messrs. Bacon and others, I agreed with them; that if they would furnish the money requisite to obtain a patent, I would put my time.

Obj. Mr. Wilson, (interrupted), I object to testimony in relation to any agreement with Bacon which is not embraced within the writing; and the written contract will speak for itself.

The WITNESS: That is what I have reference to—the contract, nothing else but the contract: I was to put my time against their money; I done the work, and they furnished the money; I have charged in this account all the items of expenditures in obtaining that patent, and have made an offset against that with my time—an equal amount—charged for my time an equal amount to the amount of expenditures paid by them.

212 Q. 3. Mr. Botts, I understand you to say, then, that the $1,005^{15}$ which you charge for services in obtaining the patent to the mine is the amount of the cost of the patent against which cost your services were to be offset under the contract of April 14th, 1873?

A. Yes, sir.

Q. 4. Mr. Wilson that is, if I understand you, you gauge your services there by the amount of their outlay?

A. That was the condition of the contract.

Q. 5. Will you produce the vouchers for these various expenditures concering which I have examined you to-day, as far as you can?

A. Yes, sir.

Defendant rests.

213 (Here a continuance is taken until Tuesday, 10th instant, at 2 o'clock p. m.)

TUESDAY, *September 10th*, 1878.

(Further continued, by consent, until Saturday, 21st instant, at two o'clock, p. m.)

SATURDAY, *September* 21*st*, 1878.

(Further continued, by consent, until Tuesday, 24th instant, at two o'clock p. m.)

TUESDAY, *September* 24*th*, 1880.

Present—Mr. Wilson, of counsel for complainant; Mr. Botts, of counsel for defendant.

214 (Upon notice, defendant Irvine produces three original papers, two of which are dated March 10th, 1877, and the third July 25th, 1878.

It is admitted that papers, of which these are copies, were delivered to defendant Irvine, at their respective dates, by S. M. Wilson and R. H. Sinton.

Said papers are offered in evidence by complainant, and marked respectively, Exhibits "A," "B," and "C," on accounting.)

Examination-in-chief of Henry D. Bacon.

By Mr. WILSON:

Question 1. Mr. Bacon, you are the same person who testified in this case on the main issues in the case heretofore, are you not?

215 Answer. Yes, sir; I am; I was sworn and testified in this case.

Q. 2. After the making of the agreement, to which you referred in your former testimony, made between Mr. Irvine and yourself and others, of the date of April 14th, 1873, did you have an arbitration with Mr. Irvine concerning the amounts of money to be paid by yourself and associates under that agreement?

(Obj. Objected to as irrelevant.)

A. I did.

Q. 3. Was there a hearing before Judge Cowles on an arbitrament between yourself and others and Mr. Irvine?

A. There was, by agreement.

216 Q. 4. Did Mr. Irvine, upon that occasion, or at any other time, present to you any account of his claim for sums of money which you were compelled to pay him under the agreement; that is, expenditures in obtaining the patent from the Government of the United States, that you were to pay?

A. Yes, sir.

Q. 5. Do you know where those original papers are?

A. I presume they are in the hands of Judge Botts or Mr. Irvine—the original papers.

Q. 6. Do you know where they are?

A. I do not.

Q. 7. They were left with the arbitrator?

A. They were left with the arbitrator, but he said that he had delivered them to Judge Botts or Mr. Irvine.

217 Q. 8. Did you subsequently apply to Judge Cowles to see if you could obtain the papers?

A. I did.
Q. 9. And you were unable to do so?
A. Yes, sir.
Q. 10. Did you at that time make copies of them?
A. Before I applied to Judge Cowles for the papers, I made copies of them.

Mr. WILSON (to Mr. Botts): Have you those papers?
Mr. BOTTS: I have not.
Mr. WILSON (to Mr. Irvine): Have you those papers?
Mr. IRVINE: Not that I know of.

218 MR. WILSON: I offer in evidence the copies of said papers now produced by the witness, both being upon one sheet, (marked Exhibit "D," on accounting.)

Obj. Objected to as irrelevant and immaterial, and on the ground that no foundation has been laid for such evidence.

Q. 11. Did Mr. Irvine at that time present those accounts against you in that arbitration?

Obj. (The same objection.)

A. He did; they were two accounts, marked "A" and "B."
Q. 12. Did he testify on that occasion?
A. He did.
Q. 13. What did he say with reference to those expenditures having been made by him in obtaining the patent—expenditures
219 which had necessarily been made in obtaining the patent?

Obj. (The same objection.)

Ans. He claimed that all the charges there were legitimate under the agreement by which he was to obtain the patent and convey to myself and associates.
Q. 14. His claims, then, against you amounted in the aggregate to how much?
A. These accounts show two thousand and seventeen dollars and fifteen cents, one being for nine hundred and twenty-five dollars, without interest being added, and the other for one thousand and ninety two dollars and fifteen cents, without interest being added.
Q. 15. That sum of two thousand and seventeen dollars and fifteen cents, he claimed against you, as I understand you, as
220 properly chargeable for his expenses in obtaining the patent under your agreement with him?
A. The entire expense, as he represented it, under the agreement for obtaining the patent, for taking charge of the mine, for expenses at Washington, his trips to the mine, pay of keeper, &c., &c., as specified in those bills.
Q. 16. Have you any vouchers in your possession of sums of money paid him on account of the agreement you made with him?
A. I have some.

Q. 17. State what amounts you paid him, and give the dates of your different payments to him under that agreement.

A. (Referring to papers.) May 29th, 1873. I seem to have paid him $45; July 23d, 1873, I appear to have paid him $360.50.

221 Q. 18. Mr. Botts, you are stating now from some memoranda which you have?

A. From receipts of Mr. Irvine, August 23d, 1873, $132; December 15th, 1873, $564.50 The next seems to be a receipt by Judge Botts, attorney for William Irvine.

Q. 19. Mr. Wilson; with an authority from Mr. Irvine attached?

A. Yes, sir; it is for $428.65, the award of Judge Cowles, the arbitrator. It was received December 13th, 1875.

Q. 20. The sum total of these payments is $1,530.65, and Mr. Irvine gives us credit for $1,485.65, a difference of $45. Does each one of those vouchers bear the signature of Mr. Irvine?

A. All except this one, which is signed by Judge Botts for
222 Mr. Irvine; which bears the authority of Mr. Irvine attached to it.

Q. 21. These vouchers you have present, and you now produce them?

A. Yes, sir.

Q. 22. And you paid that amount of $1,530.65 to Mr. Irvine?

A. Yes, sir.

Cross-examination by Mr. BOTTS:

Q. 1. With respect to that controversy between you and Mr. Irvine, which was submitted for arbitration to Judge Cowles, the sole question in that controversy was what expenditures were involved in the obtaining of the patent, was it not; I mean to ask if
223 that was not the only question in dispute between yourself and Mr. Irvine?

A. The whole question involved was the question of the agreement of the 14th of April, 1873.

Q. 3. You mean that portion of the agreement which provided—

A. (Interrupting.) Well, the whole agreement was before Judge Cowles in that arbitration, for him to decide what, under that agreement, I should pay to Mr. Irvine for myself and associates.

Q. 4. You mean now, the agreement that the expenses of obtaining the patent should be borne not jointly, but solely by yourself and the parties whom you represented?

A. Just exactly as the agreement described.

224 Q. 5. Then the question was, what, under a proper construction of those expenses made by Mr. Irvine, came within the purview of that portion of the agreement?

A. Yes, sir.

Q. 6. Mr. Irvine contended on his part that certain expenditures were properly expenditures on account of obtaining the patent, and you thought they did not come within that, and that was the question submitted to the arbitrator?

A. He claimed that all of his personal expenses in looking after this thing should be paid by us. He claimed that the keeping of the mine should be paid by us entirely, and that any expenditures that he might have made in regard to obtaining the patent should be paid by us.

Q. 7. And you contended, on your part, that those particular expenses should be paid jointly, and not by one party alone?

225

A. No, sir; I did not claim that; I claimed that certain things that he had charged in his account were not legitimate, under that agreement. I did allow, and did not contest, a great many of the claims that he put in, and there were some claims that he put in that I objected to, as I thought they were not legitimate under the agreement; but everything that was legitimate under the agreement that myself and associates should pay the whole of that. That, as I understood, was the award of the arbitrator.

Q. 8. But there were expenses incurred there which were admitted to be joint expenses, were there not?

A. I do not remember of any joint expenses; no, sir; I don't think there were any joint expenses. The agreement did not provide for any joint expenses.

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Re-direct examination by Mr. WILSON:

Question 1. The two accounts which were presented before Judge Cowles, the arbitrator, marked, respectively, "A" and "B," and copies of which are in evidence here, marked Exhibit "D, on Accounting" were made up of items which Mr. Irvine claimed that yourself and associate should pay?

Obj. (Objected to as irrelevant and immaterial.)

A. Yes, sir.

Q. 2. That you and your associates should pay exclusively?

227

Obj. (The same objection.)

A. Yes, sir.

Q. 3. Did he not testify upon the examination before Judge Cowles that he expected nobody else to pay them except yourself and your associates?

Obj. (The same objection.)

A. He did; he stated that he had made no claim against anybody else for any charges; did not expect anybody else to pay; they were the full charges for expenditures against the mine during that period of time.

A. Yes, sir.

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Re-cross examination by Mr. BOTTS:

Question 1. You made some statement just now about what Mr. Irvine testified to on the investigation before Judge Cowles. Did you take any notes of his testimony?

Answer. Very likely I did; but I took absolutely a copy of the testimony taken by Judge Cowles.

Q. 2. Have you that copy?

A. I have.

Q. 3. Will you produce it?

A. I will. (Produces.)

Q. 4. What do you say that he testified to—I mean of your own recollection, now?

229 A. I mean to state that he testified during that examination that these items that he had presented—I won't pretend to state the exact language of it—these items that he presented in his bills, "A" and "B," were all of the charges that he had to make against the property during the time between the date of the agreement and the date of the organization; I think it was; I am not sure about that, but I think that was the time—between the date of the agreement, the 14th day of April, 1873, and the date of the organization, or the date of the obtaining of the patent; that was it; and that he had not made any other charge to anybody else, and did not expect to make any other charge. That was the substance of what he testified to. He stated that the charges that he had made in Exhibits

230 "A" and "B" were all the charges that he had made against the property, and all that he expected to make against the property; that he had no claim against anybody else for this account that he had rendered, "A" and "B." I won't say that that is the exact language, but the substance of that is in that testimony.

Q. 5. The account that was adjudicated by Judge Cowles commenced in 1873, did it not?

A. I think it was on or about the date of this agreement; I don't remember; possibly this charge of forty-five dollars was before that agreement was absolutely concluded, but we had in substance concluded upon that agreement.

Q. 6. What I mean is this: there was no account for or any testimony before Judge Cowles concerning any expenditures

231 made by Mr. Irvine on this property before 1873.

A. No, sir; not before 1873; it was during the period of the existence of that contract up to the obtaining of the patent, and it was during that period that he stated the substance of what I have already given.

Q. 7. Was not the testimony taken down in that case by a shorthand reporter?

A. No, sir; it was taken down by Judge Cowles, himself.

Q. 8. Are you sure of that?

A. I am sure that all that I copied from was taken by Judge Cowles himself.

Q. 9. Was there not a shorthand reporter present to take down the testimony?

232 A. It seems to me that at the winding up there was a shorthand reporter present; but I did not copy from the

shorthand reporter's copy; this was entirely from Judge Cowles' case, as he wrote it out—the testimony of Mr. Irvine.

Q. 10. In whose handwriting is this copy which you now produce?

A. That is my own.

Complainant rests.

Rebuttal.—Examination-in-chief of William Irvine.

By Mr. BOTTS:

233 Question 1. There were some sums of money paid you for keeper's fees, &c., that you had expended on this property in 1870; there were some amounts that were paid you by Mr. Brown; those sums of money were paid you, under the contract, that was in negotiation, and never finally completed, for the purchase of this property by Fair and Selover, were they not?

A. Yes, sir; those moneys were paid under that contract; they were to pay me twenty thousand dollars for the property, and all expenses, and those moneys were to cover the expenses.

Q. 2. And it was under that arrangement that the moneys were paid?

A. Yes, sir.

234 Cross-examination by Mr. WILSON:

Question 1. Do you recognize here in the paper marked Exhibit No. 18, which was offered in evidence during the examination upon the main issues in this case, the items of the account which Mr. Brown paid you?

Answer. I cannot tell from memory what those items were. I could tell by finding the old original bill. That (Exhibit No. 18) is not my handwriting, and I do not recognize it.

Q. 2. Look at the paper marked Exhibit No. 21, and state if that is in your handwriting, and whether or not that contains the items.

A. That is in my handwriting.

235 Q. 3. Are not the items contained therein the same as the items in Exhibit No. 18?

A. I don't know; it is in my handwriting, and it is correct.

Q. 4. You received that money from Mr. Brown?

A. Yes, sir; I know the money came from the Bank of California; I don't know that it all came from Mr. Brown.

Testimony closed.

(Continued for argument before the master until Tuesday October 8th, 1878, at 2 o'clock p. m.)

236 *Complainant's Exhibit "A."—On Accounting.*

This day, July 26th, 1876, I handed to Mr. William Irvine a written offer to pay the assessment delinquent on the Morgan mine, (a true copy of which I annex to his memorandum,) with the statement

that it was such. Mr. Irvine received it, and said that he must consult with his attorneys and counsel; that he would attend to the business. The service was made in a saloon on S. W. cor. Pine and Sansom streets, and in the presence of Mr. Irvine's brother.

ROBERT CROCKETT.

Friday, July 26, 1878, at 10.30 a. m.

237 SAN FRANCISCO, *July 25th*, 1878.

Mr. WM. IRVINE.

SIR: I see by an advertisement in the Daily Alta California of this date that the capital stock of the Morgan Mining Company has been assessed by the directors and trustees, at the rate of fifty (50) cents per share, and that the said assessment is now delinquent, and that the sale of the delinquent stock will be made as per the notice of sale referred to, on Monday, the twenty-ninth (29th) day of July, A. D. 1878, at the hour of one (1) o'clock p. m. of said day; I annex a copy of said notice of the stock of the company issued originally to you. I claim, as you know, by the suit of myself against you now pending in the U. S. circuit court of this circuit, four thousand nine hundred and ninety-seven (4,997) shares under the decree of the said U. S. circuit court duly rendered and entered. I now
238 offer to pay, and am ready to pay you, as my trustee, the sum of two thousand four hundred and ninety-eight and $\frac{50}{100}$ dollars ($2,498.50), being the amount of said assessment of fifty cents per share on said 4,997 shares of stock, and the additional amount for delinquency, say two hundred dollars ($200.00), and if that is not enough, such sum as may properly attach by reason of such delinquency.

Respectfully,
(Signed) SUMNER T. DUNHAM.
By S. M. WILSON,
His Attorney.
And by R. H. SINTON,
His Attorney-in-Fact.

Mogan Mining Company; location of principal place of business, San Francisco, California; location of works, Carson, Calaveras county, California. Notice: There is delinquent upon the following described stock, on account of assessment (No. 4), levied
239 on the first day of June, 1878, the several amounts set opposite the name of the respective shareholders, as follows:

Names.	*No. Cert.*	*No. Shares.*	*Amount.*
H. D. Bacon	18	2,771	$1,385 50
Thomas Brown	27	181	90 50
C. T. Botts	10	365	182 50
C. T. Botts	65	357	178 50
John Caperon, trustee	51	334	167 00
John Caperon, trustee	52	919	459 50
F. L. Coffee	58	50	25 00
Robert Dixon	45	182	91 00

Names.	*No. Cert.*	*No Shares.*	*Amount.*
William Edwards	71	100	$50 00
John A. Freaner, trustee	39	285	142 50
John A. Freaner, trustee	40	285	142 50
John A. Freaner	49	30	15 00
John A. Freaner	6	479	239 50
Frank Henderson	61	50	25 00
Frank Henderson	61	5	2 50
William Irvine	3, 9,737	1,696–1,792	4,868 91
William Irvine	15, 212	96, 1,792	106 00
William Irvine	74	175	87 50
Robert Irvine	72	615	307 50
E. B. Jago	73	100	50 00
Robert Noblett	5	479	23[illegible] 50
E. A. Richardson, trustee	22	500	250 00
E. A. Richardson, trustee	23	500	250 00
E. A. Richardson, trustee	24	500	250 00
240			
E. A. Richardson, trustee	25	500	250 00
E. A. Richardson, trustee	26	50	25 00
E. A. Richrrdson, trustee	47	117	58 50
T. K. Wilson	4	25	12 50

And in accordance with law and an order of the board of directors made on the first day of June, 1878, so many shares of each parcel of such stock as may be necessary, will be sold at public auction, at the office of the company, No. 533 Kearney street, room 18, San Francisco, California, on Monday, the twenty-ninth day of July, 1878, at the hour of one o'clock p. m. of said day, to pay said delinquent assessment thereon, together with costs of advertising and expenses of the sale.

JOHN J. RAPHAEL, *Secretary.*

Office: No. 533 Kearney street, room 18, San Francisco, California. Jy 10.

241 *Complainant's Exhibit "B."—On Accounting.*

SAN FRANCISCO, *March 10th*, 1877.

Mr. WM. IRVINE.

SIR: I see by an advertisement in the Daily Alta California, of this date, that the capital stock of the Morgan Mining Company has been assessed by the directors or trustees at the rate of one dollar per share, and that the said assessment is now delinquent, and that the sale of the delinquent stock will be made as per the notice of sale referred to, on Monday, March 12th, 1877, at the hour of one o'clock p. m. I annex a copy of said notice of the stock of the company issued originally to you. I claim, as you know, by the suit of myself against you, now pending in the U. S. circuit

242 court of this circuit, the one-half. I now offer to pay, and am ready to pay, you, as my trustee, the amount of said assessment, one dollar per share, and the additional amount for delinquency, say two hundred dollars, and if that is not enough, such sum as may properly attach by reason of such delinquency.

Respectfully,

SUMNER T. DUNHAM,
By S. M. WILSON, *His Att'y*,
And by R. H. SINTON,
His Attorney-in-Fact.

Morgan Mining Company; location of principal place of business, San Francisco, California; location of works, Calaveras county, California. Notice: There is delinquent upon the following described stock, on account of assessment (No. 3) levied on the nineteenth day of September, 1876, the several amounts set opposite the names of the respective shareholders, as follows:

243

Name.	*Certificate.*	*Shares.*	*Amt.*
Thomas Brown	27	181	$181 00
Henry D. Bacon	16	2,771	2,171 00
C. T. Botts	10	365	365 00
Frank L. Coffee	57	150	150 00
Andrew J. Coffee	55	50	50 00
Andrew J. Coffee	50	100	100 00
John Caperton, trustee	51	334	334 00
John Caperton, trustee	52	919	919 00
Robert Dixon	45	182	182 00
John A. Freanor, trustee	39	285	285 00
John A. Freanor, trustee	40	285	285 00
John A. Freanor	49	30	30 00
William Irvine	3	9,737, 1,696, 1,792	9,737 94
William Irvine	15	212, 96, 1,792	212 06
Robert Irvine	12	1,072	1,072 00
Robert Noblett	5	479	479 00
Robert Noblett, administrator of estate of Wm. A. Addison, deceased	6	479	479 00
E. A. Richardson, trustee	22	500	500 00
E. A. Richardson, trustee	23	500	500 00
E. A. Richardson, trustee	24	500	500 00
E. A. Richardson, trustee	25	500	500 00
E. A. Richardson, trustee	26	100	100 00
E. A. Richardson, trustee	47	117	117 00
J. C. Tarbot	50	5	5 00

244 And in accordance with law and an order of the board of directors made on the nineteenth day of September, 1876, so many shares of each parcel of such stock as may be necessary will be sold at public auction, at the office of the company, Room

No. 1, 108 and 110 California street, San Francisco, California, on Monday, the twentieth day of November, 1876, at the hour of one o'clock p. m. of said day, to pay said delinquent assessment thereon, together with costs of advertising and expenses of the sale.

JAMES H. WALLACE, *Secretary.*

Postponement.

At a meeting of the board of directors of the Morgan Mining Company held on the twentieth day of November, 1876, the sale of the delinquent stock advertised above was postponed until
245 Saturday, December sixteenth, 1876, at the same hour and place as above stated.

By order of the board of directors.

JAMES H. WALLACE, *Secretary.*

Postponement.

By order of the board of directors, the sale of the above described stock is postponed until Saturday the thirteenth day of January, 1877, at the same place and hour.

N. 21. JAMES H. WALLACE, *Secretary.*

Office: Room 1, 108 and 110 California street, San Francisco, California. D. 16.

Postponement.

By order of the board of directors, the sale of above de-
246 scribed stock is postponed until Saturday, February tenth, 1877, at same place and hour.

Ja. 13. JAMES H. WALLACE, *Secretary.*

Postponement.

By order of the board of directors, the sale of above described stock is postponed until Friday, March 2, 1877, at same place and hour.

Fe. 9. JAMES H. WALLACE, *Secretary.*

Postponement.

By order of the board of directors, the sale of above described stock is postponed until Monday, March 12, 1877, at same place and hour.

M. 3. JAMES H. WALLACE, *Secretary.*

247 Copy of the within served this day at between twelve and one o'clock p. m., on Wm. Irvine, personally.

R. H. SINTON.
ROB'T CROCKETT.
S. M. WILSON.

March 10, 1877.

248 *Complainant's Exhibit "C."—On Accounting.*

SAN FRANCISCO, *Nov. 10th*, 1877.

MR. WM. IRVING.

SIR: I find in the Daily Alta California, of this date, the following advertisement:

Morgan Mining Company; location of principal place of business, San Francisco, California; location of works, Calaveras county, California. Notice: There is delinquent upon the following-described stock on account of assessment (No. 3), levied on the nineteenth day of September, 1876, the several amounts set opposite the names of the respective shareholders, as follows:

Names.	*Certificate.*	*Shares.*	*Am't.*
Thomas Brown	27	181	$181 00
Henry D. Bacon	16	2,771	2,771 00
C. T. Botts	10	365	365 00
Frank L. Coffee	57	150	150 00
249 Andrew J. Coffee	55	50	50 00
Andrew J. Coffee	56	100	100 00
John Caperton, trustee	51	334	334 00
John Caperton, trustee	52	919	919 00
Robert Dixon	45	182	182 00
John H. Freaner, trustee	39	285	285 00
John H. Freaner, trustee	40	285	285 00
John H. Freaner	49	30	30 00
William Irvine	3	9,737, 1,696, 1,792	9,737 94
William Irvine	15	212, 96, 1,792	212 06
Robert Irvine	12	1,072	1,072 00
Robert Noblett	5	479	479 00
Robert Noblett, administrator of estate of Wm. H. Addison, deceased	6	479	479 00
E. A. Richardson, trustee	22	500	500 00
E. A. Richardson, trustee	23	500	500 00
E. A. Richardson, trustee	24	500	500 00
E. A. Richardson, trurtee	20	500	500 00
E. A. Richardson, trustee	26	100	100 00
E. A. Richardton, trustee	47	117	117 00
J. C. Tarbot	50	5	5 00

And in accordance with law and an order of the board of directors made on the nineteenth day of September, 1876, so many shares of each parcel of said stock as may be necessary will
250 be sold at public auction, at the office of the company, room No. 1, 108, and 110 California street, San Francisco, California, on Monday, the twentieth day of November, 1876, at the hour of one o'clock p. m. of said day, to pay said delinquent assessment thereon, together with costs of adver's't and expenses of the sale. JAMES H. WALLACE, *Secretary.*

Office: Room 1, 108 and 110, California street, San Francisco, California.

Postponement.

At a meeting of the board of directors of the Morgan Mining Company held on the twentieth day of November, 1876, the sale of the delinquent stock advertised above was postponed until Saturday, December sixteenth, 1876, at the same hour and place as above stated. By order of the board of directors.

N. 21. JAMES H. WALLACE, *Secretary.*

251 Postponement.

By order of the board of directors the sale of the above-described stock is postponed until Saturday, the thirteenth day of January, 1877, at the same place and hour.

JAMES H. WALLACE, *Secretary.*

Office: Room 1, 108 and 110, California street, San Francisco, California. D. 16.

Postponement.

By order of the board of directors the sale [of] above described stock is postponed until Saturday, February tenth, 1877, at the same place and hour.

Ja. 18. JAMES H. WALLACE, *Secretary.*

252 Postponement.

By order of the board of directors the sale of above-described stock is postponed until Friday, March 2, 1877, at same place and hour.

Fe. 9. JAMES H. WALLACE, *Secretary.*

Postponement.

By order of board of directors the sale of above-described stock is postponed until Monday, March 12, 1877, at same place and hour.

M. 3. JAMES H. WALLACE, *Secretary.*

You are well aware that a part of the stock mentioned in said advertisement as standing in your name is the same now in
253 contest between you and myself in the case of Sumner T. Dunham against yourself and others, pending in the United States circuit court of the district of California. I now request you to state what amount you claim under the declaration of trust annexed to the complaint in that case, and for any and all assessments paid by you heretofore. I now offer to pay you, as my trustee, all such sums due to you under said declaration and for assessments previously paid, and also to pay to you the amount now necessary to pay the present delinquent assessment.

Respectfully, SUMNER T. DUNHAM,
By S. M. WILSON, *His Att'y.*
And by R. H. SINTON,
His Attorney-in-Fact.

Copy of the within served this day between 12 and 1 o'clock p. m., on Wm. Irvine personally.
March 10th, 1877.

S. M. WILSON.
R. H. SINTON.
ROBT. CROCKETT.

254 *Complainant's Exhibit "D."—On Accounting.*

(In pencil.)

Messrs. Henry D. Bacon and others to Wm. Irvine, Dr.

1873		
April 30.	Cash expenses on first trip to get the Morgan Mine surveyed	$76 50
	Do. paid in Surveyor Gen'l Office, extra work	25 00
	Wages for keeper of mine from Ap'l 1 to July 1, @ $3 per day, 78 days, (voucher)	234 00
	Cash paid in Land Office in Stockton	40 00
July 23.	Expenses traveling to Carson	64 00
"	To I. A. Foster, county clerk, Calaveras Co.	3 50
"	To Lindsay, of Angels, notary fees, &c.	2 50
"	To R. Russell, of San Andreas, for buggy	16 00
"	To feed for team, toll, &c.	9 00
"	To Wm. Bishell, posting notice, &c.	5 00
"	To Wm. Lyman, " "	5 00
"	To copy papers from Supreme Court	12 00
"	To publication of notices for patent	15 00
"	To paid for 5 acres of land in mine	25 00
"	To paid notary fees	1 50
"	To paid express charges on paper, W. F. & Co.	1 50
"	To wages of keeper of mine from July 1 to Dec. 1, 5 months, @ $78 per mo., (½ voucher)	390 00
		$925 00

255

Cr.

July 23.	By cash from H. D. Bacon	$360 50
Dec. 15.	By " " " "	564 50
		$132 00

Aug. 23, '73, in pencil.

Copy of settlement as per statement furnished to Dec'r 1st, 1873, and paid in full.
(Signed) WM. IRVINE.

256 (In Pencil.)

Mess. Henry D. Bacon and others to Wm. Irvine, Dr.

			Time.	*Int. per cent.*	
1873.					
April 15.	To cash, to T. K. Wilson, to go to the city to dismiss all suits, $100		24 16/30	12.27	$50 00
June 1.	" to Tilden & Wilson, for drawing agt., $50		23	5.75	25 00
Dec. 19.	" traveling expenses to Carson		16 12/30	10.66	65 00
	" p'd taxes, 1873, $6.60		16 12/30	.54	3 30
1874.					
Jan. 14.	" telegraphing to San Andreas		15 17/30	.55	3 55
	" " Washington		15 17/30	.94	6 05
Mar. 19.	" paid keeper of mine, from Dec'r 1, '73, to March 19, '74, time of issuing of patent, 95 days, a $3 per day		13 12/30	38.10	285 00½
Mar. 24.	" p'd B'k of Cal'a, order R. A. Fisher, Wash.		13 7/30	26.46	00 00
July 8.	" p'd Blake, per copy of Report made to Fair & Sellover, $75		9 23/30	3.66	37 50
Aug. 7.	" p'd for recording patent in Calaveras Co.		8 24/30	.26	3 00
Oct. 1.	" p'd traveling expenses to Carson, to pay and discharge keeper of mine and reduce wages		7	3.95	56 50
	" p'd keeper of mine, from Mar. 19, '74, to Oct. 1, '74, 161 days, @ $3 per day, $483		7	16.91	241 50
Dec. 31.	" taxes 1874, $49.50		4	1.17	24 75
1875.					
May 1.	" p'd keeper of mine, from Oct. 1, '74, to May 1, '75, 182 days, @ $1 per day, $182		7	6.37	91 00
					$1,092 15
	Int. on acct. up to date				127 70
					$1,219 85

Cr.

Aug. 23. By cash from H. D. Bacon, $132.

SAN FRANCISCO, *May* 5, '75.

257 *Acc't Presented before the Examiner upon the Examination of Irvine, on Accounting, Sept. 7th, '78.*

Cash expended by William Irvine on account of Morgan Mine.

258

1870.				
July 9.	To cash paid	T. K. Wilson		$123 50
	"	retainer fee		25 00
	"	John Douglas		110 75
	"	acknowledging power att'y		2 00
Nov. 1.	"	copy records		23 00
	"	T. K. Wilson		100 00
Oct. 4.	"	costs in Cal'a county court		44 75

1870.				
Nov.	21.	To cash paid	certified copy of papers	$26 20
Dec.	28.	"	B. K. Thorne, sheriff's fees	26 88
1871.				
Jan.	20.	"	T. K. Wilson	100 00
March	29.	"	John Douglas	3 50
April	26.	"	T. K. Wilson	90 00
June	4.	"	expense to San Andreas	67 50
July	20.	"	B. K. Thorne	28 50
Nov.	2.	"	exp's to San Andreas and Carson	95 00
	18.	"	costs on suit	5 00
1872.				
June	4.	"	redemption of mine	107 50
Dec.	19.	"	taxes, 1872–3	6 60
1873.				
Jan'y	10.	"	T. K. Wilson	100 00
	26.	"	"	100 00
April	15.	"	"	100 00
	19.	"	United States land office	50 00
	19.	"	extra work in U. S. L. office	12 50
	23.	"	E. A. Beuvais	45 00
	23.	"	expenses to Carson, posting notices	76 50
May	15.	"	T. K. Wilson	100 00
	23.	"	Wells, Fargo & Co	2 00
	23.	"	T. K. Wilson	100 00
June	2.	"	"	110 00
	11.	"	Tilden & Wilson on contract	50 00
July	20.	"	independent newspaper	15 00
	20.	"	H. W. Weaver	40 00
	23.	"	trip to Carson	64 00
	23.	"	sundry expenses	80 00
	23.	"	J. A. Foster	3 50
	23.	"	Lindsay, notary fees	2 50
		Amount carried forward		$2,036 68

259 *Cash Expended on Account of the Morgan Mine by William Irvine.*

1873.				
July	23.	To amount brought forward		$2,036 68
		To cash paid	Russell for buggy hire	16 00
		"	feed and toll	9 00
		"	Wm. Bickle	5 00
		"	Wm. Lyman	5 00
		"	for copy of papers "Supreme Court"	12 00

1873.				
July	23.	To cash paid for 5 acres land " mine "	$25	00
		" notary fees	1	00
Aug.	7.	" Hall, witness fees	12	50
Oct.	28.	" T. K. Wilson	100	00
Oct.	28.	" trip to Stockton	40	00
Nov.	22.	" T. K. Wilson	100	00
Dec.	2.	" T. K. Wilson	100	00
Dec.	11.	" T. K. Wilson	60	00
Dec.	15.	" trip to San Andreas	65	00
Dec.	24.	" T. K. Wilson	100	00
1874.				
Jan'y	14.	To cash paid telegraphing	3	55
Jan'y	24.	" "	6	05
March	24.	" R. A. Fish, " Washington "	200	00
Aug.	7.	" recording patent	6	00
		" expense to San Andreas	12	00
		" report from Blake	75	00
Oct.	1.	" expense trip to Carson	56	50
Dec.	31.	" taxes for 1874	49	50
Dec.	31.	" sundry expenses, incorporating, exam'g title, notary fees, &c.	51	00
Dec.	31.	" keeper of Morgan Mine, from July 19th, 1870, to April 14, 1873—853 days, at $3.00 per day	2,559	00
		" keeper of mine from Ap'l 14, '73, to Sept. 14, '74—442 days, at $3.00 per day	1,326	00
		" keeper of mine from Sept. 14, '74, to Oct. 1, '74—17 days, at $3.00 per day	51	00
		" keeper of mine from Oct. 1, '74, to May 1, '75—182 days, at $1.00 per day	182	00
		Due by average, Jan'y 1st, 1874	$7,264	78
		Interest on above amount of $7,264.78, from Jan'y 1st, 1874, to Sept. 1st, 1878—56 months, at 1 per cent. per month	4,068	28
		Amount carried forward	$11,333	06

260 *Cash Expended on Account of the Morgan Mine by William Irvine.*

	To amount brought forward	$11,333	06
	salary for services and time in managing property from July 9th, 1870, to Dec. 31st, 1870, inclusive, at $100.00 per month	573	34

To interest on above amount, Jan. 6, '71, to Sep. 1, '78, 92 mos., at 1 per cent. per mo.	$527	47
salary from Jan'y 1, '71, to Jan. 1, '72, 12 mos., at $100	1,200	00
interest on above $1,200.00 from Jan'y 1, '72, to Sept. 1, '78, 80 mos., at 1 per cent. per mo.	960	00
salary from Jan'y 1, '72, to Jan'y 1, '73, 12 mos., at $100.00 per mo.	1,200	00
interest on above $1,200.00 from Jan'y 1, '73, to Sept. 1st, 1878, 68 mos., at 1 per cent. per month	816	00
salary from Jan'y 1, '73, to Jan'y 1, '74, 12 months, at $100.00 per mo	1,200	00
interest on above $1,200.00 from Jan'y 1, '74, to Sept. 1, '78, 56 mos., at 1 per cent. per mo.	672	00
salary from Jan'y 1, '74, to Jan'y 1, '75, 12 mos., at $100.00 per month	1,200	00
interest on above $1,200.00 from Jan'y 1, '75, to Sept. 1, '78, 44 mos., at 1 per cent. per mo.	528	00
salary from Jan'y 1, '75, to April 9, '75, $3\frac{3}{30}$, at $100.00 per mo.	330	00
interest on above amount, $330.00, from April 9, '75, to Sept. 1, '78, 40 mos. 23 [days], at 1 per cent. per month	134	54
services in obtaining patent to mine under contract of April 14th, 1873	1,005	15
interest on above amount of $1,005.15, due by average May 1st, 1874, 52 months, at 1 per cent. per mo.	522	67
Amount carried forward	$22,202	23

261 *Cash Expended on Account of the Morgan Mine, by William Irvine.*

	To amount brought forward	$22,202	23
1875.			
May 31.	To cash paid assessment No. 1, on Morgan Mine, at 50c. per share, on 9,994 shares	4,997	00
	interest on above amount of $4,997.00, from May 31, '75, to Sept. 1, '78, $39\frac{1}{30}$ mos., at 1 per cent. per month	1,950	49
1876.			
Feb. 29.	cash paid assessment No. 2, 50c. per share, on 9,994 shares	4,997	00
	interest on above amount of $4,997.00, from Feb'y 29, '76, to Sept. 1, '78, 30 mos., at 1 per cent. per month	1,504	09

1876.			
Feb. 29.	To cash p'd advertising delinquency		$2 00
	interest on advertising delinquency, 30 3/30 mos., 1 per cent.		60
1877.			
March 12.	cash paid assessment No. 3, $1.00 per share, on 9,994 shares		9,994 00
	interest on above amount of $9,994.00, from March 12, '77, to Sept. 1, '78, 17 20/30 mos., at 1 per cent. per mo.		1,765 61
	cash p'd advertising delinquency		40 00
	interest on $40, at 1 per cent. per mo., 17 20/30 mos.		7 07
1878.			
Jan'y 27.	cash paid assessment No 4, 50c. per share on 9,994 shares		4,997 00
	interest on above amount of $4,997.00, from July 27, '78, to Sept. 1, '78, 1 4/30 mos., at 1 per cent. per mo.		56 63
	cash p'd advertising delinquency		5 62
	interest on above $5.62, 1 4/30 mos., at 1 per cent.		06
			$52,519 40

Credit.

By	cash received from H. D. Bacon and others, on ac't contract of April 14th, 1873	1,485 65	
	interest due by average on above from May 1st, 1874, to Sept. 1, '78, 52 mos., at 1 per cent. per mo.	772 53	
			2,258 18
	Balance due Sept 1st, 1878		$50,261 22

E. & O. E. San Francisco.

262 UNITED STATES OF AMERICA, *District of California*, } *ss:*

I, L. S. B. Sawyer, standing master in chancery of the circuit court of the the United States for the District of California, do hereby certify that on the several days named in the depositions hereto annexed I was attended, at my office, room No. 1 U. S. court's building, in the city and county of San Francisco, California, by the counsel and witnesses aforesaid, and that each and all of said witnesses were duly sworn and examined and their deposi-

tions reduced to writing, (first being taken in shorthand,) by S. C. Houghton, under my direction.

L. S. B. SAWYER,
Standing Master in Chancery.

Endorsed: Filed 30 April, 1871. L. S. B. Sawyer, clerk.

263 *Exceptions to Master's Report.*

In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the District of California.

SUMNER T. DUNHAM
vs.
WILLIAM IRVINE *et al.* } In Equity.

Exceptions to Master's report in the above-entitled cause, filed April 30, 1879.

And now comes the defendant, William Irvine, and excepts to the said report, and specifies the following errors as grounds of exceptions:

1. From the sum of $3,520.10, the amount of disbursements subsequent to the 14th of April, 1873, the Master deducts the sum of $2,017.15, which he finds to be the cost of the patent, and to have been paid by Bacon & Co., and not by Irvine. (See p. 5,
264 lines 15, 16, 17, 18, 19, and 20 of said report.)

The Master says that Irvine's two bills rendered Bacon put the expense of obtaining the patent at this sum. The bills referred to are marked "Complainant's Exhibits B and C on accounting," and are attached to the report. By turning to them it will be seen that they do not purport to be an account of the money expended in obtaining the patent. On the contrary, it purports to be an account rendered by Irvine against "Bacon and others," (called by the Master, Bacon & Co.,) for all the moneys expended by Irvine in and about the property, under the agreement of 1873. Bacon says that this account includes other items besides those expended for the patent. See his testimony, p. 19, lines 11 to 21, inclusive, of "Depositions upon examination upon accounting, before L. S. B. Sawyer, Master," appended to the report.

265 Irvine, in his testimony, says that the cost of obtaining the patent was $1,005.15, see p. 13 of "deposition," and this is a much larger amount than was actually allowed and paid by Bacon & Co; such amount being, in fact, not in excess of the sum of $650.

2. The Master erred in not allowing Irvine, for his services in procuring the patent, an amount equal to the sum paid by Bacon & Co., as the cost of the patent.

3. The Master erred in not allowing Irvine interest on moneys expended by him in and about the care and preservation of the trust property.

4. The Master erred in deducting from the amount of disburse-

ments made by Irvine the amounts paid him by Sinton, Fair & Brown, which he finds amounts to the sum of $2,058.75.
266 See p. 6, lines 1 to 7, inclusive.

GARBER & THORNTON,
Solicitors for Defendants.

C. T. BOTTS, *Of Counsel.*

Endorsed: Filed 29 May, 1879. L. S. B. Sawyer, clerk.

On the 20th day of August, A. D. 1878, an order amending said interlocutory decree was filed, and is hereto annexed.

On the 30th day of April, A. D. 1879, L. S. B. Sawyer, Esq., master in chancery, filed his report, which report is hereto annexed.

On the 29th day of May, A. D. 1879, exceptions to said Master's report were filed, and are hereto annexed.

267 *Order Modifying Master's Report, &c.*

On the 10th day of September, A. D. 1879, an order was made and entered herein in the words and figures following, to wit;

At a stated term of the circuit court of the United States of America for the district of California, held at the court room, in the city and county of San Francisco, on Wednesday, the 10th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

Present: The Honorable Lorenzo Sawyer, circuit judge.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

This cause heretofore argued and submitted to the court for consideration and decision upon the exceptions to the master's
268 report herein, having been duly considered, it is ordered that the 2d and 3d and 4th exceptions to the master's report be, and the same are, overruled; that the first exception be sustained, and that there be deducted the sum of one thousand and five $\frac{15}{100}$ ($1,005$\frac{15}{100}$) dollars, as the cost of procuring the patent from the sum of three thousand five hundred and twenty $\frac{19}{100}$ ($3,520$\frac{19}{100}$) dollars, instead of the sum of two thousand and seventeen $\frac{15}{100}$ ($2,017$\frac{15}{100}$) dollars, which was deducted therefom by the Master; which deduction will leave due from Dunham on that item the sum of four hundred fifty-two $\frac{33}{100}$ (442\frac{33}{100}$) dollars, instead of the sum of one hundred eighty-nine $\frac{33}{100}$ (189\frac{33}{100}$) dollars, as reported by the Master.

It is further ordered that the report of the Master be modified in this particular, as herein directed, and that, as so modified, it be confirmed, reserving the question as to whether interest shall
269 be allowed on said balance of four hundred forty-two $\frac{33}{100}$ (442\frac{33}{100}$) dollars; and, if so, from what date; and all questions relating to the assessments paid and interest thereon except as to the amounts reported and date of payment be and the same are reserved for consideration on the application for final decree.

I hereby certify that the foregoing is a full, true, and correct copy of an original order entered in the above entitled action.

Attest my hand and seal of said circuit court, this 27th day of Dec'r, A. D. 1879.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

On the 16th day of December, A. D. 1879, an order was
270 made and entered herein, in the words and figures following, to wit:

Order in relation to Final Decree.

At a stated term of the circuit court of the United States of America, for the district of California, in the city and county of San Francisco, on Tuesday, the 16th day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

Present: The Honorable Lorenzo Sawyer, circuit judge.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

It is ordered that in the final decree defendant be allowed the assessments paid by him on the stock directed by the decree to be transferred to complainant, as the amounts thereof are re-
271 ported by the Master and confirmed by the court; also interest at the legal rate on the two assessments paid May 31, 1875, and February 29th, 1876, from the date of their respective payments till March 12, 1877, at which time the complainant offered to *to* pay said assessment; also that he be further allowed said sum of $442.33 ascertained to be due by the order conferring the Master's report: also interest on the said sum last mentioned, and the said aggregate amount of said assessments allowed to said defendant at the legal rate from the date of the Master's report to the date of the final decree, but that no other interest than as herein specified, be allowed; and it is further ordered that the final decree prepared and proposed by complainant be so modified as to conform to this order.

272 I hereby certifiy that the foregoing is a full, true, and correct copy of an original order entered in the above-entitled action.

Attest my hand and seal of said circuit court, this 27th day of Dec'r, A. D. 1879.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Final Decree.

Thereafter a final decree was filed and entered herein, in the words and figures following, to wit:

In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE and THE MORGAN MINING COMPANY, Defendants. } No. 1614.

273 This cause having heretofore come on for hearing before this court at the July term thereof, in the year 1877, and having been argued by counsel and taken under advisement by the court, and the court at the February term, 1878, having duly considered the same, and having at said last named term ordered and decreed as follows, that is to say:

"That the defendant, William Irvine, was at the time of the filing of the bill of complaint herein, and still is, the trustee of and for the complainant, and held, and still holds, as such trustee, for the use and benefit of the complainant, the one-half of nine thousand nine hundred and ninety-seven shares of the capital stock of the Morgan Mining Company referred to in the complaint, the said shares being the gross proceeds received by said defendant
274 Irvine for and as the consideration of a conveyance and disposition by him to said mining company of the one-half of the mining property called the "Morgan Mine," referred to in the said declaration of trust, dated March 28th, A. D. 1874, mentioned and described in the bill of complaint herein; said one-half of said capital stock so held by said defendant Irvine in trust for the complainant, being however subject to a claim of the said defendant Irvine against the same for one-half of all necessary expenses referred to in said declaration of trust, and it is ordered that it be referred to L. S. B. Sawyer, as a Master, to take and state an account of all the necessary expenses, including counsel fees, before the twenty-eighth day of March, A. D. eighteen hundred and seventy-four, incurred, or thereafter incurred, in and about said property by said defendant Irvine up to the time of con-
275 veyance of said property by said Irvine to said Morgan Mining Company, and in taking said account the said Master shall make unto said complainant all just allowances, as well for all moneys paid by him as by his assignors or grantors, George P. Ihrie and Richard H. Sinton, or other persons, by their or either of their requests, or by their or either of their procurement, to said Irvine, or at his request, or for the benefit of said mining property referred to in said bill of complaint. And the Master shall make all just allowances to said defendant Irvine, and the master shall state what, upon the balance of said accounts, shall be due from the complainant to said defendant Irvine. And in taking and stating the

account before said Master either of the parties are at liberty to use any of the evidence heretofore taken in this case and to in-
276 troduce other evidence. And the Master is to make his report touching the matters hereby referred to him with all convenient speed."

And the said Master having in all things complied with the order so as aforesaid made, and (after hearing the parties) having made his report and stated an account between the parties, and the same having, on exceptions duly filed, been in some things modified by the court, and as so modified, confirmed. And it appearing from the premises that there is due from the plaintiff to the defendant William Irvine, on such accounting, the sum of four hundred and forty-two $\frac{33}{100}$ dollars ($442\frac{33}{100}$) by reason of the necessary expenses incurred and paid by said defendant Irvine under the declaration of trust referred to in the bill of complaint herein, and also
277 that there is due from the plaintiff for assessments on his share of said capital stock, levied by said corporation and paid by said Irvine, the sum of twelve thousand four hundred and ninety-two and $\frac{50}{100}$ dollars ($12,492.50), making in all payable from said plaintiff to the defendant Irvine, including interest properly chargeable thereon, the sum of fourteen thousand two hundred and twenty-one and $\frac{76}{100}$ dollars ($14,221\frac{76}{100}$).

And this cause again came on for hearing in said report of the Master so confirmed, and on motion for final decree at the July term of this court, and was argued by counsel and taken under advisement by the court, and the same having been duly considered, thereupon, upon such consideration, it is ordered, adjudged, and decreed that the defendant, William Irvine, was, at the
278 time of the filing of the bill of complaint herein, and still is, the trustee of and for the complainant, and held, and still holds, as such trustee for the complainant, the one-half of nine thousand nine hundred and ninety-seven (9,997) shares of the capital stock of the said Morgan Mining Company, referred to in the complaint, being the gross proceeds received by said defendant Irvine for and as the consideration of a conveyance and disposition by him to said mining company of the one-half of the mining property called the "Morgan Mine," referred to in the Declaration of Trust, dated March twenty-eighth (28th), 1874, (mentioned and described in the bill of complaint herein), said one-half of said capital stock so held by said defendant in trust for the complainant being, however, subject to the claim of said defendant Irvine
279 against the same for one-half of the necessary expenses referred to in said declaration of trust, which amounts to the sum of four hundred and forty-two and $\frac{33}{100}$ dollars ($442.33) and interest properly chargeable therein, and for the one-half of said assessments, so as aforesaid paid by said Irvine and interest properly chargeable thereon: all of said sums, including interest, amounting at this date to the sum of fourteen thousand two hundred and twenty-one and $\frac{76}{100}$ dollars ($14,221.76).

And it is further ordered, adjudged, and decreed that upon payment of said last-named sum, with interest thereon at the rate of seven per cent. per annum from this date by said complainant, his legal representatives or assigns, within sixty days from the
280 date of this decree, either to said defendant Irvine, or to the clerk of the court, as depository for the said defendant Irvine, the said last-named defendant do assign and transfer to said complainant, his legal representatives or assigns, four thousand nine hundred and ninety-eight and one-half (4,998½) shares of the said capital stock of said Morgan Mining Company, and on the default of said defendant Irvine, that L. S. B. Sawyer, Esq'r., the clerk of this court, be, and he is hereby, appointed a commissioner, with powers and authority to represent said defendant Irvine, and to transfer and assign, or cause to be transferred and assigned, the said four thousand nine hundred and ninety-eight and one-half (4,998½) shares from said defendant Irvine, and out of his name to the complainant, his legal representatives or assigns, and to the name of the complainant, his legal representatives or
281 assigns, and that said Morgan Mining Company do cause the said number of shares to be transferred upon its proper books from the name of said defendant Irvine to said complainant, or his legal representatives or assigns.

And it is further ordered and decreed that the defendant Irvine, during said period of sixty days, be enjoined and restrained from incumbering, or transferring, or assigning in any manner the said four thousand nine hundred and ninety-eight and one-half (4,998½) shares of said capital stock to any one other than the complainant, or his assigns or legal representatives, and "that upon the payment as aforesaid by the complainant, his legal representatives or assigns, of said sum of money and legal interest so required to be paid within said sixty days, said injunction be, and is hereby,
282 adjudged perpetual. And it is further ordered that the complainant do have and recover his costs in this behalf expended.

(Signed) LORENZO SAWYER, *Circuit Judge.*

Dec. 24, 1879.

Endorsed: Filed and entered December 24th, 1879. L. S. B. Sawyer, clerk. By J. F. O. Beirne, dep'y cl'k.

283 *Memorandum of Costs.*

In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants.

Memorandum of Costs and Disbursements of Complainant.

Fees clerk, 19th district court:

Commencing suit	$7 50
Sheriff's fees, serving papers	7 00

Notary fees, affidavit to complaint	$0 50
Notary fees, affidavit to undertaking for injunction	1 00
Marshal's fees, serving subpœnas	2 50
Fees clerk U. S. circuit court	80 40
½ fees examiner taking testimony, &c	195 70
Fees master in chancery on accounting	100 00
½ fees taking testimony on accounting and reference	35 80
Fees U. S. commissioners at New York, taking deposition of Geo. P. Ihrie	15 00
To witness fee, H. D. Bacon, 2 days, at $1.50	3 00
To witness fee, H. J. Tilden, 1 day, at $1.50	1 50
To witness fee, R. H. Sinton, 7 days, at $1.50	10 50
To amount carried forward	$460 40
284 Amount carried forward	$460 40
Witness fees, Mrs. R. H. Sinton, 1 day, at $1.50	1 50
Witness fees, W. H. L. Barnes, 1 day, at $1.50	1 50
Witness fees, J. H. Dane, 1 day, at $1.50	1 50
Witness fees, Thos. Brown, 2 days, at $1.50	3 00
Witness fees, county clerk, at $1.50	1 50
Attendance upon and taking depositions of H. J. Tilden, H. D. Bacon, R. H. Sinton, Mrs. R. H. Sinton, W. H. L. Barnes, J. H. Dane, Thos. Brown, Geo. P. Ihrie, Wm. Irvine, and T. K. Wilson, $2.50 each	25 00
Attendance upon and taking depositions of Wm. Irvine H. D. Bacon, on accounting, $2.50 each	5 00
To solicitor's docket fee	20 00
To affidavit to this cost bill	50
Total costs, taxed at	$519 90

L. S. B. SAWYER, *Clerk.*

UNITED STATES OF AMERICA,
District of California, City and County of San Francisco, } ss:

Robert Crockett, being first duly sworn, deposes and says, that he is the clerk for the solicitors for the complainant in the
285 above-entitled action, and as such is better informed relative to the above costs and disbursements than the said complainant.

That the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said action.

ROB'T CROCKETT.

Subscribed and sworn to before me, this 27th day of December, A. D. 1879.

[SEAL.] JAMES MASON, *Notary Public.*

To C. C. Botts and Messrs. Garber & Thornton, solicitors for defendants:

You will please take notice that on Monday, the twenty-ninth (29th) day of December, A. D. 1879, at the hour of two
286 o'clock p. m. of said day, we will apply to the clerk of said court to have the within and foregoing memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

WILSON & WILSON,
Solicitors for Complainant.

Endorsed: Service of a copy of the within memorandum of costs, &c., and notice to tax same is hereby admitted this 27th day of December, A. D. 1879. Garber & Thornton, solicitors for defendants. Filed Dec. 27th, 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep. cl'k.

287 *Certificate to Enrolled Papers.*

Whereupon said pleadings, certified copies of orders, Master's report, memorandum of taxed costs, and final decree are thereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, &c.:

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep'y Clerk.*

Endorsed: Enrolled papers. Filed 27 December, 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

288 *Stipulation.*

In the Circuit Court of the United States, Ninth Judicial Circuit and District of California.

SUMNER F. DUNHAM *vs.* WILLIAM IRVINE *et al.*

It is hereby stipulated and agreed that the evidence of all witnesses who are or may be in the State of California may be taken orally before J. F. O'Beirne, as an examiner of said court, to be used on the trial of this case at the respective times herein named; that is to say, on the part of the complainant before the 15th day of December, A. D. 1876, on the part of the defendants before the fifteenth day of January, A. D. 1877, and that any rebutting evidence on the part of plaintiff may be taken betore the first day of February, A. D. 1877; and that this stipulation may be taken as the order of the court to the same purport, or an order to the same effect may be entered hereon. Nothing, however, in this stipula-

tion shall prevent either party from applying to the court for an extension of the times above agreed upon.

October 10th, 1876.

WILSON & WILSON,
Sol's for Pl'nt'ff.

289 GARBER & THORNTON,
For Def't.

Endorsed: No. 1614. U. S. circuit court, State of California. Sumner T. Dunham, plaintiff, *vs.* William Irvine *et al.*, defendants. Stipulation. Filed 10 October, 1876. L. S. B. Sawyer, clerk.

290 *Commission and Deposition of George P. Ihrie, &c.*

The President of the United States to Joseph Gutman, Jr., Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you, said Joseph Gutman, Jr., full power and authority diligently to examine upon his corporal oath or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed, George P. Ihrie, as a witness on the part of complainant, in a certain cause now pending, undetermined in the circuit court of the United States of the ninth judicial circuit in and for the district of California, wherein Sumner T. Dunham is complainant, and William Irvine and others are defendants.

And we do hereby requre you before whom such testimony may be taken to reduce the same to writing, and to close it up under your hand and seal, directed to Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, at the city of San Francisco, as soon as may be convenient after the execution of this com-
291 mission; and that you return the same, when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 26th day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundred and first.

[SEAL.] LORENZO S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep'y Cl'k.*

In the Circuit Court of the United States, 9th Circuit and District California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants. } No. 1614.

On motion of Wilson & Wilson, solicitors for complainant in the

above-entitled action, and upon filing interrogatories as re-
292 quired by the rules of this court, it is ordered that a com-
sion issue out of this court in said action, directed to a commissioner or commissioners, to be named by the court, to take the deposition of George P. Ihrie, of the city, county, and State of New York, a witness to be produced, sworn, and examined on behalf of the complainant herein.

San Francisco, Oct. 14th, 1876.

WILSON & WILSON,
Solicitors for Complainant.
L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Cl'k.*

The commission ordered to be issued in the within order may issue ten days from this date without further notice or formality.

Oct. 14th, 1876.

GARBER, *For Def'ts.*

(Endorsed:) Filed Oct. 16th, 1876. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, dep. cl'k. A true copy. Seal. Attest, &c. L. S. B. Sawyer, cl'k.

293 United States of America, Circuit Court of the United States, Ninth Judicial Circuit, District of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify the annexed to be a copy of the original order entered in the Rule Book in the therein entitled cause now on file and remaining of record in my office; that I have compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 26th day of October, A. D. 1876.

[SEAL.] L. S. B. SAWYER, *Cl'k.*
By —— ——, *Deputy Clerk.*

In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants,
} No. 4012.

294 The defendants and their attorneys will please take notice that we will move the above-named court, or the judge thereof, on Monday, the 23d day of October, A. D. 1876, at eleven o'clock a. m. of said day, at the court room of said court, in the city and county of San Francisco, for a commission to be issued out of the clerk's office of said court, directed to such commissioner, in the city, county, and State of New York, as said court or judge may

select, to take the testimony of George P. Ihrie, a witness on the part of the complainant, residing in said city of New York, upon interrogatories, on the part of the complainant, filed in the clerk's office of said court, a copy of which is herewith served upon you, and upon such cross-interrogatories on the part of the defendants, as you may prepare and file to be annexed to said commission.

October 12th, 1876.

WILSON & WILSON,
Solicitors for Complainant.

To Messrs. GARBER AND THORNTON, *Solicitors for Defendant.*

295 In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.* Defendants. } No. 4012.

Interrogatories on the part of the complainant to be annexed to a commission to be issued out of the above-named court in the above-entitled cause, to be propounded to George P. Ihrie, a witness on the part of the complainant, residing in the city, county, and State of New York.

1st interrogatory. What is your name, age, residence, and occupation?

2d interrogatory. Are you acquainted with the complainant, Sumner T. Dunham, and the defendants, William Irvine and The Morgan Mining Company, or either, and which of them, and how long, and at what places have you known them respectively?

3d interrogatory. Are you acquainted with Richard H.
296 Sinton, T. H. Wilson, and H. J. Tilden, (the two last being of the law firm of Tilden & Wilson,) or either, and which of them, and how long have you known them respectively, and at what places?

4th interrogatory. Are you acquainted with a certain gold-bearing lode or mine situate on Carson Hill, in Calaveras county, State of California, and known familiarly as the "Morgan Mine; if yea, state when and where you first knew of it, and how long you have known it, actually or by representation?

5th interrogatory. Did you have any conversation with the defendant, William Irvine, at any time or times, in relation to the said mine and the ownership or interest therein of said Richard H. Sinton; if yea, state when and where, and under what circumstances the same occurred; state all that said Irvine and yourself said at such time, or times, on that subject, and what any one else present and participating in any of said conversations said; state also who was present, giving times and places as fully as you can?

6th interrogatory. At any interview between yourself and said
William Irvine on the subject last inquired of, was anything
297 said by said Irvine on the subject of the expenses that said

Irvine had incurred in managing said mine, or as to said Sinton's obligation to pay a share of said expenses, or as to the amount of such expenses; if yea, state when and where the same occurred, who was present, and all that was said by said Irvine, or any of the said subjects, and all that any one else said on those subjects, at such times, in the presence of said Irvine?

7th interrogatory. If you shall, in your answers to either of the foregoing questions, refer to any conversations between yourself and said Irvine, state whether, at the time of any such conversations, or about that time, made any memorandum of what occurred; if yea, please annex the same to your answer hereto, if you can; and if you cannot, state why you cannot, and what became of such memorandums, or what you did with them?

8th interrogatory. If in answer to any of the foregoing interrogatories you shall mention any conversations you may have had with said William Irvine, state what interest, if any, you had in the subject-matter of the conversations, and how you came to be present upon the occasions to which you may refer?

298 9th interrogatory. Do you know anything of, or did you ever hear, the defendant William Irvine say anything about a certain paper-writing, signed by said Irvine, purporting to declare or set forth the interest of said Richard H. Sinton? If yea, state all that you know of the same, or that you have heard said Irvine say on that subject. State also, if you know, where said paper writing at any time was, or now is, and what became of the same.

10th interrogatory. Did said defendant Irvine ever show or present to you any account of the expenses paid or incurred by him in relation to said mine? If yea, state when, where, in whose presence, and under what circumstances. State also why the same was shown or presented to you, and what you did with the same.

11th interrogatory. If, in answer to your last interrogatory, you shall say that said Irvine showed or presented to you such an account, state whether you have the same and can annex it to your answer. If you cannot annex the original, annex a copy, if you can, and state how, when, and where you obtained it, and how you knew it to be a copy.

299 12th interrogatory. Do you know of any other matter or thing material to the merits of this case, or of benefit to the complainant herein? If yea, state the same fully and in detail, giving time, place, and circumstances, as if thereunto specially interrogated.

WILSON & WILSON,
Solicitors for Complainant.

(Endorsed:) Service of a copy of the within is hereby admitted, this thirteenth day of October, A. D. 1876. Chas. T. Botts, of counsel for defendant. Filed Oct. 13th, 1876. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, dep. cl'k.

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, District of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of
300 California, do hereby certify the annexed to be a copy of the original direct interrogatories in the therein entitled cause, to be propounded to George P. Ihrie now on file and remaining of record in my office; that I have compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 26th day of October, A. D. 1876.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

In the Circuit Court of the United States for the Ninth Circuit and District of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants. } No. 4012.

Cross-interrogatories on the part of the defendants to be annexed to a commission to be issued out of the above-named court
301 in the above-entitled cause, to be propounded to George P. Ihrie, a witness on the part of the complainant, residing in the city, county, and State of New York.

1st cross-interrogatory. For what consideration and on what terms and conditions did you execute the assignment or conveyance to the complainant, Sumner T. Dunham, dated June 29th, 1875, and upon which this action is based?

2d cross-interrogatory. Have you any pecuniary interest in the result of this action? If yea, state what and the extent and character of that interest.

3d cross-interrogatory. If in answer to the complainant's 5th interrogatory you should say you had any conversation, or conversations, with the defendant, William Irvine, in relation to the said mine, and the ownership or interest therein of the said Richard H. Sinton, state the time of such conversation, or conversations, giving year, month, day of the month, and time of day; also the places in which said conversations were held, giving city, street, house and room?

4th cross-interrogatory. Did you not, between the 5th and the 15th day of September, 1874, have a conversation with the defendant, William Irvine, in relation to the said Sinton's interest
302 in the Morgan mine in the counting-room of the mercantile house of Irvine, Harker & Co., in Front street, in the city of San Francisco?

5th cross-interrogatory. If you answer the foregoing cross-interrogatory in the affirmative, state what passed at such conversation, what you said on that occasion to the said Irvine, and what the said Irvine said to you?

6th cross-interrogatory. State for what consideration, and on what terms and conditions the said Richard H. Sinton executed to you the assignment or conveyances of his interest in the Morgan Mine, bearing date September 8th, 1874.

7th cross-interrogatory. When the said Sinton executed to you the assignment or conveyance referred to in the last interrogatory, did you know that the said Sinton claimed the interest he therein assigned or conveyed to you under an instrument of writing, signed by the said William Irvine, but held in escrow by T. K. Wilson?

8th cross-interrogatory. Did you ever ask the said T. K. Wilson on what terms he held said document in escrow, or upon what contingency the execution of said document was to be completed by delivery to the said Richard H. Sinton?

303 9th cross-interrogatory. Did you ever ask or demand that the said Wilson should deliver the said document to you as the assignee of the said Richard H. Sinton?

10th cross-interrogatory. On the 8th day of September, A. D. 1874, was Richard H. Sinton indebted to you; and, if so, state in what amount?

11th cross-interrogatory. Was the said Richard H. Sinton indebted to you on the 5th day of June, 1876; if so, state in what amount and how much debt was evidenced?

12th cross-interrogatory. Has the said Richard H. Sinton any pecuniary interest in the result of this action action; if yea, state what that interest is?

13th cross-interrogatory. Have you received any letters from the said Richard H. Sinton in relation to his pecuniary interest in this suit; if yea, please annex them to your answer to this cross-interrogatory?

14th cross-interrogatory. Was not the said Richard H. Sinton insolvent on the 8th day of September, 1874?

304 15th cross-interrogatory. Was not the absolute assignment made to you by the said Sinton on the 8th day of September, 1874, intended by you and by him as security for a debt due from you to him?

16th cross-interrogatory. Did not the said Sinton state to you, or in your hearing, that his object in making this conveyance to you was to prevent his creditors from reaching the property thereby conveyed to you?

GARBER & THORNTON,
Solicitors for Defendants.

Endorsed: Filed Oct. 23, 1876. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, dep. cl'k.

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, District of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify the annexed to be a copy of the original cross-interrogatories in the therein-entitled cause to be propounded to George P. Ihrie, now on file, and remaining of record in
305 my office; that I have compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 26th day of October, A. D. 1876.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

At a stated term of the circuit court of the United States of America, for the district of California, held at the court room, in the city of San Francisco, on Monday, the 24th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Present: The Honorable Lorenzo Sawyer, circuit judge.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

On motion of Samuel M. Wilson, Esq., solicitor for complainant, and on filing stipulation of counsel for defendants consenting
306 thereto, it is ordered that a commission issue herein to Joseph Gutman, Jr., Esq., a commissioner of the United States circuit court for the southern district of New York, residing in the city of New York, State of New York, to take the deposition of George P. Ihrie, a witness on behalf of complainant, upon interrogatories and cross-interrogatories filed.

I hereby certify that the foregoing is a full, true, and correct copy or an original order made and entered in the above-entitled action.

Attest my hand and seal of said circuit court, this 26th day of October, A. D. 1876.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By ——, *Deputy Clerk.*

Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of California.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

Deposition of GEORGE P. IHRIE, taken on the part of the
307 complainant, under and pursuant to the annexed commission, and on the interrogatories and cross-interrogatories thereto annexed, before me, Joseph Gutman, Jr., United States commissioner, the commissioner in said commission named and appointed.

NEW YORK, *November* 15, 1876, 10 A. M.

The said witness, GEORGE P. IHRIE, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy in said commission, and interrogatories named, did, in answer to the interrogatories and cross-interrogatories annexed to said commission, and by me propounded to him, depose and say as follows:

In answer to the first interrogatory:

My name is George P. Ihrie; I am 46 years [of] age; I am residing at New York city *pro tem.;* I am a civil engineer by profession.

In answer to the second interrogatory:

I am acquainted with Sumner T. Dunham and William Irvine only; I became acquainted with the former in New York city on or about the 29th of June, 1875, with the latter on or about the 10th of September, 1874.

308 In answer to the third interrogatory:

I am acquainted with Richard H. Sinton, T. K. Wilson, and H. J. Tilden. I became acquainted with the former in Rio de Janeiro, Brazil, in the fall of 1847, with the two latter in San Francisco, Cal., on or about the 10th of September, 1847.

In answer to the fourth interrogatory:

I only knew the mine by reputation, having first heard of it through R. H. Sinton in September, 1874.

In answer to the fifth interrogatory:

I had only two interviews with William Irvine, and they were in a small room in the law office of Wilson & Tilden, in Kearney street, near Clay, in San Francisco, Cal., on or about the afternoon of the 10th and 14th of September, 1874, respectively. In the first interview he said positively, and without any qualification whatever, that Richard H. Sinton was one-fourth owner of the Morgan mine. In the second interview he repeated the same thing, but with the qualification that Sinton's one-quarter interest was subject to one-half of certain expenditures he had made on and for the mine, amounting to about $7,000, which he wanted me to pay
309 at once, and which I agreed to assume and pay from out the mine, provided Sinton said the charges or expenditures were correct. I asked for, and obtained from him, at the second interview, a list of those expenditures which were examined by Sinton, a copy was made by him, (Sinton,) examined and compared by me, and which I herewith append. It is marked Exhibit A. One conversation was an extended one, but this is the substance as given. No other persons were present at either of the interviews. The interviews occurred from the fact that Sinton was indebted to me for borrowed money, and had assigned to me as security his inter-

est in the Morgan mine. He claimed a quarter interest in that mine, and took me to see Irvine, who recognized Sinton's ownership, as I have stated. At the time of the payment by me of the one-half of the $7,000 expended we could not agree.

In answer to the sixth interrogatory:

I have answered the interrogatory in my last answer as fully as I am able.

In answer to the seventh interrogatory:

After leaving Irvine I made pencil memoranda, in the
310 form of notes addressed to Sinton, of these interviews, and gave them to him. What he did with them I do not know.

In answer to the eighth interrogatory:

My interest in the subject-matter of these interviews was the fact that Sinton had deeded to me as security for money loaned him, his one-quarter interest in the Morgan mine, controlled by Irvine, and hence my presence and interviews as already set forth.

In answer to the ninth interrogatory:

I heard nothing from Irvine about that certain paper, but did from Sinton, who showed me a copy, and I well remember the phrase, "when otherwise disposed of," to be found in that paper, and which arrested my attention; I know not where is that original certain paper, nor what became of it, except I learnt from information that it is in possession of Tilden and Wilson.

In answer to the tenth interrogatory:

This is answered in my answer to the fifth and sixth interrogatories, with this addition, that the original was handed by me in person to Irvine, as he requested.

311 In answer to the eleventh interrogatory:

This is answered in my answer to the fifth, sixth, and tenth interrogatories.

In answer to the twelfth interrogatory:

I know nothing further about the matter, except that at my interviews with Irvine he stated, unequivocally, Sinton's ownership of one-quarter interest in the Morgan mine, and that he was holding and managing the same for Sinton, and that Sinton's one-quarter interest was liable for its half share of what he had expended; he wanted me as Sinton's assignee to pay at once the one-half of his disbursements, as per the account hereto annexed, before referred to.

Cross-interrogatories:

In answer to the first cross-interrogatory:

In consideration of the assumption of the debt and promise of judgment to me by Sumner T. Dunham of the full amount of R. H.

Sinton's indebtedness to me, I deeded to S. T. Dunham my one-fourth interest in the Morgan mine of California.

In answer to the second cross-interrogatory:

I have no pecuniary interest in the result of this action, except the one above mentioned.

312 In answer to the third cross-interrogatory:

I have answered this on my direct examination as fully as I am able in the particulars asked.

In answer to the fourth cross-interrogatory:

No. After the 15th of September I had an interview there about another matter—a question of veracity between William Irvine and Henry D. Bacon.

In answer to the fifth cross-interrogatory:

I had no conversation at the time and place referred to on the subject of Sinton's interest.

In answer to the sixth cross-interrogatory:

For and in consideration of $3,500 loaned him R. H. Sinton deeded to me his one-quarter interest in the Morgan mine of California as security for that loan.

In answer to the seventh cross-interrogatory:

Yes; but I knew nothing of said instrument in writing being held in escrow by anybody.

In answer to the eighth cross-interrogatory:

No. I never talked business with T. K. Wilson. I exchanged with him the salutations of the day only when I was twice in his offices.

313 In answer to the ninth cross-interrogatory:

I never did.

In answer to the tenth cross-interrogatory:

On the day in question R. H. Sinton owed me between $3,500 and $4,000.

In answer to the eleventh cross-interrogatory:

On the day in question R. H. Sinton was indebted to me about $4,500 as evidenced by his note now in charge of the Bank of California for safe keeping for me.

In answer to the twelfth cross interrogatory:

I know of none.

In answer to the thirteenth cross-interrogatory:

I have received no such letters.

In answer to the fourteenth cross-interrogatory:

I do not know, but should think not, he then owning one-quarter interest in the very valuable Morgan mine of California.

In answer to the fifteenth cross-interrogatory:

No; I never owed Sinton one cent. The assignment was made for the purposes shown in my previous answer.

In answer to the sixteenth cross-interrogatory:

314 He did not; the object of the conveyance was as follows: At this time, September, 1874, I had urgent need for about $3,000, and made an unusually earnest demand of him for the money he owed me; I never before spoke to him so strongly on the subject; he evidently felt the force of my language, and then and there deeded to me his one-quarter interest in the Morgan mine of California, as security for the loan I made him in 1872, and which loan was prompted by affection solely.

GEORGE P. IHRIE,
Ex-Insp'r Gen'l Staff of Gen'l U. S. Grant,
Late of the U. S. Army, Consulting Civil Engineer.

Subscribed and sworn to before me, this 15th day of November, 1876.

JOSEPH GUTMAN, JR.,
United States Commissioner.

315 Copy of account of expenditures of Morgan Mine as rendered to Gen. Geo. P. Ihrie, Sept. 12th, 1874, there being no caption to said account.

1870.			
July	9.	Cash to Wilson, purchase of mine	$123 50
	19.	" retainer fee	25 00
		John Douglas, getting possession of mine, traveling expenses, &c.	110 75
		acknowledging powers of att'y	2 00
Nov.	1.	copy of Cal. Co. records, C. O. D.	23 00
		T. K. Wilson	100 00
Oct.	4.	costs in Cal. Co. court	44 75
Nov.	21.	certified copy of court papers	26 20
Dec.	28.	B. K. Thorne, sheriff's fees	26 88
1871.			
Jan'y	20.	T. K. Wilson	100 00
Mch.	29.	John Douglass, pick and shovel	3 50
Apl.	26.	T. K. Wilson	90 00
June	4.	expenses to San Andreas	67 50
July	20.	B. K. Thorne, on writ of assistance	28 50
Nov.	2.	to San Andreas and Carson	95 00
	18.	p'd costs in suit	5 00

1872.			
June 4.	Cash to redemption of mine	$107	50
Dec. 19.	taxes for 1873	6	60
1873.			
Jan'y 10.	T. K. Wilson	100	00
26.	"	100	00
Apl. 15.	"	100	00
19.	U. S. office, $50, ½ of this	25	00
	extra work in land office, $12.50	6	25
23.	E. A. Beauvais, surveying, $45	22	50
316			
April 23.	to Carson for putting up notices, $76.50	38	25
May 15.	to T. K. Wilson	100	00
28.	Wells, Fargo & Co., charges on papers, $2	1	00
	T. K. Wilson, to Sac. to dismiss suits	100	00
June 2.	" "	100	00
July 20.	Independent newspaper, $15	7	50
	to H. W. Weaver, $40	20	00
23.	to trip to Carson's about patent, $64	32	00
June 23.	to expenses for sundries, $80	40	00
Aug. 7.	to Hall, as witness	12	50
Oct. 28.	T. K. Wilson	100	00
	expenses to Stockton and Sac. about papers, $40	20	00
Nov. 22.	T. K. Wilson	100	00
Dec. 2.	" "	100	00
18.	" "	60	00
15.	to trip to San Andreas, $65	32	50
24.	T. K. Wilson	100	00
1874.			
Jan'y 14.	telegraphing, $3.55	1	78
24.	" to Washington, $6.05	3	02
March 24.	R. A. Fish, $200	100	00
Aug. 7.	recording patent, $6	3	00
	expenses from S. A. to Carson's, $12	6	00
	paid Blake for report, $75	37	50
	To keeper at Morgan mine from July 19, 1870, to April 14, 1873, making 853 days time, at $3	2,559	00
	To paid keeper at Morgan mine from April 14, 1873, to Sept. 14, 1874, making 442 days time, at $3, making this amount $1,326	663	00
		$5,686	48

317 To interest at one per cent. per month frmo July 9th, 1870, to Sept. 9th, 1874, 4 years and two months, making $2,843.20, averaging this at half time ---------- $1,421 60

$7,108 08

Exhibit A. Joseph Gutman, Jr., commissioner.

True copy:

GEO. P. IHRIE.

R. H. SINTON.

SAN FRANCISCO, CAL., 14 *Sep'r*, 1874.

UNITED STATES OF AMERICA, } *ss:*
Southern Dtstrict of New York, }

I, Joseph Gutman, Jr., United States commissioner for the southern district of New York, and the commissioner named in and appointed by the annexed commission, do hereby certify that I have been this day attended by George P. Ihrie, a witness on the part of the complainant in the said commission named, and the said witness having been by me first duly and publicly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth
318 in the matter of controversy in said commission named, he was by me examined on the interrogatories and cross-interrogatories annexed to the said commission, which were by me propounded to him, and in answer thereto he did depose and say, as appears by the deposition and exhibit hereto annexed; his said deposition was by me reduced to writing in his presence, and from his answer as given, and after carefully reading the same to him, he swore to and subscribed the same in my presence.

In witness whereof, I have hereunto set my hand and seal, this fifteenth day of November, A. D. 1876.

[SEAL.] JOSEPH GUTMAN, JR.,
United States Commissioner.

Endorsed: 1614. United States circuit court, district of California. Sumner T. Dunham *vs.* William Irvine *et al.* Commission and deposition of George P. Ihrie, opened by consent of counsel, this 29th day of Dec'r, 1876. ———, sol'r for compl't, and
319 ———, sol'r for def's. Fees, paid by compl't, $15.00. Re-filed 29th Dec., 1876. L. S. B. Sawyer, cl'k. Per J. F. O'Beirne, dep.

320 Circuit Court of the United States, District of California

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants.

Be it remembered that on this 27th day of December, A. D. 1876,

at any office in the United States court's building, in the city of San Francisco, State of California, before me, J. F. O'Beirne, an examiner in chancery, duly appointed by the circuit court of the United States for the ninth circuit, district of California, personally appeared R. H. Sinton and T. K. Wilson, witnesses on behalf of complainant in the above-entitled suit.

S. M. Wilson, Esquire, appeared as counsel for complain-
321 ant, and C. T. Botts, Esquire, as counsel for defendants.

Counsel for defendants consenting, and defendant, Irvine, himself, being present, a continuance is taken until to-morrow, 28th instant, at eleven o'clock a. m., and said witnesses are notified to be present at that hour.

THURSDAY, *December* 28, 1876.

By consent, a further continuance is taken until to-morrow, 29th instant, at eleven o'clock a. m.

FRIDAY, *December* 29, 1876.

Present: Messrs. Wilson and Hayes, of counsel for complainant. Messrs. Garber and Botts, of counsel for defendants.

Deposition of T. K. Wilson.

322 T. K. WILSON, being sworn as a witness for complainant, produces a paper demanded by complainant's counsel; said paper being the same hereinafter produced in evidence and marked Plaintiff's Exhibit No. 2.

Deposition of R. H. Sinton.

R. H. SINTON, being called as a witness for said complainant, and by me duly sworn, did thereupon depose and say, as follows, that is to say:

Examination-in-chief by Mr. WILSON:

Question 1. State your name, age, residence, and occupation.

Answer. Name, Richard H. Sinton; age, fifty years; residence, San Francisco; occupation, collector of licenses for the city
323 and county of San Francisco. Dealing in real estate is my regular business.

Q. 2. You have been resident here how long?

A. I have been resident here since the 22d day of December, 1848.

Q. 3. Are you acquainted with the premises—the gold-bearing quartz, lode, and mine described in the complaint, situated on Carson Hill, in the county of Calaveras, in the State of California, familiarly known as and called the Morgan Mine? If so, state how long you have been acquainted with it.

A. I am; I have been acquainted with it since a few weeks after its original discovery, in 1850 or 1851.

Q. 4. Are you acquainted with the defendant, William Irvine?

A. I am.

324 Q. 5. How long have you known him, and under what circumstances did you become acquainted with him?

A. In 1867 James G. Fair was in possession of the property for himself and A. A. Selover, of New York, in April, I think, 1867, working the property, developing it, expending a large sum of money—had expended large sums upon it; during that year, after this April, suit was commenced against Mr. Fair and Mr. Selover by William A. Addison and others, to recover certain interests in that property. Pending this suit in the year 1869, it was determined between Mr. Fair and myself to obtain, if possible, a tax title to the property, I representing A. A. Selover as his agent. In seeking about for a proper person to entrust with this deli-

325 cate operation I made the acquaintance of William Irvine; I introduced the subject-matter to him.

Q. 6. By whom were you introduced to Mr. Irvine?

A. By a mutual friend, Mr. Jeff Gatewood, now of San Diego. I explained the condition of affairs to Mr. Irvine, and requested him to purchase the property at the tax sale. He consented to do it, and finally became the owner of the tax title under the judgment of the district court of Calaveras county. It was in the following year, in due course of time after the sale; I think it was sold in December, 1869, and in due course of time—six months, or one thing or other—he became the owner of the property by tax sale by deed from the sheriff.

Q. 7. State further what connection Mr. Irvine and your-

526 self had subsequently with that mining property?

A. Mr. Fair at the time was still in possession of the premises, by his agent—Rooney—I think it was; at all events, he was in possession. He denied the entry of Mr. Irvine, who demanded the possession under that deed. A writ of assistance, I believe they call it, was issued, and Mr. Fair ejected, and Mr. Irvine placed in full possession. I have probably gone beyond the chronological order of events as they took place, and I will therefore simply retrace. This brings it up to July, 1870. Pursuant to obtaining the tax title, and carrying out that idea, Mr. Irvine did, on the 14th of January, 1870, show me a letter from the sheriff of Calaveras county, stating that the whole property had been sold to a friend of his on the 28th of December preceding—December, 1869.

327 Q. 8. M. Garber, a friend of the sheriff.

A. Yes, sir: "a friend of his." I presume it means that. It is underscored in the original letter.

Q. 9. Where is the letter?

A. There is a press copy of it in my copy-book. (Referring to memorandum.) In that letter the sheriff says he has sold the property to a friend of his, who will, at any time, assign the same to Mr. Irvine. Subsequent to this, upon notification by Mr. Irvine of the amount to be paid for the same, namely, on the 18th of February, 1870, I wrote to James G. Fair at Virginia City for $105.19,

being the amount of tax sale and expenses, and including fifteen dollars for T. K. Wilson's fee for services. March 1st, 1870, I wrote to Mr. Fair——

328 Q. 10. (Interrupting.) Those memoranda to which you are referring are also extracts from your letter-press book?

A. Yes, sir.

Q. 11. You have the book?

A. Yes, sir; wrote to Mr. Fair that I had endorsed his check to Mr. Barber—H. P. Barber, now dead—for $105.19; I endorsed the check over to Mr. Barber, and requested him to pay the same to Mr. Irvine; on March 15, 1870, I acknowledged the receipt of the duplicate of the above from Mr. Fair—the receipt of the duplicate of the check for $105.19.

Q. 12. Mr. Wilson, you do not mean a duplicate; you mean that you got another draft, do you not?

329 A. Another check for the same amount; March 15, I acknowledged the receipt of another check for that amount, which I paid to Mr. Irvine on the day I received it; February 27th, 1871, I wrote to Mr. Fair, as follows——

Q. 13. Will you please to proceed to state your connection and that of Mr. Irvine with the Morgan mine, what transactions you had between each other, and what was subsequently done between you and Mr. Irvine in reference to the mine.

A. We will resume the thread from the point when the writ of assistance was obtained and delivery of the possession was made by the sheriff; shortly after Mr. Irvine obtained possession, I informed Mr. Irvine that the whole transaction had been made for the benefit of Fair and Selover, and desired to know what

330 compensation he would expect for his services in the matter; after a considerable time, and having visited him at his place of business, in Front street, in company with Mr. Fair, he made known his demand, which, being deemed exorbitant by Mr. Fair, the matter broke off for that time.

Q. 14. Will you state what that demand was?

A. I think it was twenty thousand dollars. Negotiations from that point were resumed in December, 1871; Col. Barnes appearing to represent Mr. Fair, and Mr. Samuel M. Wilson, Mr. Selover. After several interviews, Mr. Irvine gave his ultimatum, absolutely, as five thousand dollars cash, and the balance, fifteen thousand dollars——

Q. 15. Mr. GARBER: What do you read from now?

331 A. A memorandum I made at the time—(resuming)—and the balance, fifteen thousand dollars, in one year, guaranteed; which Messrs. Barnes and Wilson undertook to communicate to their principals in the premises for further action; whether the principals ever responded to their attorneys is more than I can say, and the matter stood in that condition until the fall of 1872, when Mr. Irvine, after extended conferences with myself, concluded to,

and did, notify, in writing, both Mr. Fair and Mr. Selover, that if they did not accept that proposition by a certain time——

Obj. Mr. GARBER: (Interrupting.) We object to the witness stating the contents of a paper, without its production, or proof of its loss.

332 The WITNESS (resuming): that he would proceed to treat the property as his own, and do what he pleased with it.

Q. 16. You are stating now the contents of a letter?

A. As near as I can recollect it. I think I have got the original one. When this course had been determined on to give this notification, I demanded to know what position I occupied in the premises.

Q. 17. Mr. WILSON. Of whom did you demand?

A. Of Mr. Irvine, and at once, without hesitation, he said that "you and myself are equally interested in the matter, after paying the necessary outlays and expenses, to an equal division of whatever I get out of it." And we occupied that position, verbally expressed between each other, from that time until the dec-

333 laration of trust of the 28th of March, 1873—that relation being merely verbal up to that time. We were in constant consultation and advising one with the other in everything touching the compromise with Addison and others, and obtaining the patent, after the compromise, from the United States Government through my correspondent in Washington, Ros. A. Fish.

Q. 18. You might state, in that connection, what Mr. Fish had to with it?

A. We desired to expedite matters, and I took charge of all the correspondence relating to the obtaining of the patent, and Mr. Fish is an extraordinarily fine agent for that business, and was engaged in that business, and he hurried the thing up in double-quick time. He is nothing but a claim agent in Washington.

334 He is my correspondent there, and has been for years.

Q. 19. Was that with the knowledge and consent of Mr. Irvine?

A. Always.

Q. 20. Proceed Mr. Sinton. You may state what you did in reference to the compromise that was made between Mr. Irvine and Addison & Company.

A. I just stated that we conferred and consulted together upon all questions touching or affecting the property in any manner.

Q. 21. State over what period of time the negotiations with Bacon, Addison & Company extended, and how many interviews were had with reference to that negotiation.

A. Well, it extended over some two or three months—

335 what exact period of time I could not state. I have no memoranda of any things of that sort; but there was nothing done unless Mr. Irvine and myself both advised and consented to it, and determined that we would accept certain propositions. We

mutually agreed that we would accept the proposition of a cession of one-half of it, and settle all difficulties, and then we proceeded immediately to obtain the patent.

Q. 22. How frequently during that negotiation did Mr. Irvine confer with you in reference to the negotiation and the terms upon which you would effect a compromise with those parties?

A. I could not name the number of times, but very frequently, while the negotiation was pending.

336 Q. 23. Did he ask and solicit your advice and judgment in reference to the terms of the compromise?

A. Well, the idea was we were partners—equal owners in the property—the same as partners in any business. We did as two men owning the property naturally would, in determining what should be done with it.

Q. 24. How intimately were you acquainted with the parties upon the other side with whom you were negotiating—Bacon, Addison & Company?

A. I knew them all intimately, all except Bacon; he I only knew slightly, but the rest of them I knew for fifteen or twenty years; in fact, since 1851.

Q. 25. What had your relations been with them?

A. Until the commencement of this suit we had been very friendly, and rather more intimate than otherwise.

337 Q. 26. Had Mr. Irvine before that time had any acquaintance with those men, or was he a stranger to them?

A. I could not say, really.

(Plaintiff's counsel here offers in evidence the agreement of the 14th of April, 1873, between William Irvine, of the city and county of San Francisco, California, party of the first part, and Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry P. Irving, Charles T. Botts, William Hance and John C. Hays, parties of the second part, of which is now presented and accepted in lieu of the original, and marked Plaintiff's Exhibit No. 1, being annexed to this deposition and forming a portion thereof, marked Plaintiff's Exhibit No. 1.)

Q. 27. Mr. Sinton, are the parties referred to in the agreement which has just been mentioned, the parties with whom Mr.

338 Irvine was negotiating, to whom you have referred?

A. They were.

Q. 28. Were you consulted by Mr. Irvine as to the terms of that agreement before it was executed by him?

A. Constantly.

Q. 29. Did you assent to it, and advise him to sign it?

A. I did. I suppose I must have read it over a hundred times.

Q. 30. Did he bring it to you for your advice, and for consultation with you about it, before he executed it?

A. He did, sir. The original copy was amended, and changed,

and worded, and I don't know what all was done with it, from time to time, until it finally suited.

339 Q. 31. Will you look upon a document produced here before the examiner, by T. K. Wilson, Esquire, under subpœna, which is dated the 28th day of March, A. D. 1874, bearing the name of William Irvine, and state, after having looked upon the same, in whose handwriting the body of the same is, in whose handwriting is the signature, "William Irvine," and, also, in whose handwriting are the signatures of the subscribing witnesses, the paper being marked Plaintiff's Exhibit No. 2.

A. I have looked upon the same, and state that it is written by myself, in my own handwriting; it is signed by William Irvine, his own proper signature, and it is witnessed in the handwriting of T. K. Wilson and H. J. Tilden.

Obj. Mr. Botts: I object to the signatures of the subscribing witnesses being proved by anybody except the subscribing witnesses themselves.

340 Q. 32. Mr. Wilson: Is the William Irvine, whose name appears signed to this document, the defendant in this action?

A. He is; and the same one to whom I have referred thus far in my testimony.

Q. 33. Of what profession or business are T. K. Wilson and H. J. Tilden?

A. They are attorneys-at-law—practicing attorneys in this city.

Q. 34. Where was the document signed by the respective parties whose signatures are annexed to it?

A. In the office of Tilden & Wilson, on Kearney street, near Sacramento, up stairs.

Q. 35. How did you come to be there on this occasion, and what occurred, and how did you come to draw and prepare that

341 instrument for the signatures of the respective persons?

A. Mr. Irvine was going off to the East, and to Europe, and as there had been nothing between us but a verbal agreement thus far, I drew the paper setting forth the facts, so that there would be some writing showing the relations to the property that existed between him and myself; that was the motive of drawing the paper; he read it over in my office, 539 California street; I read it to him, and he read it over, and we read it again; he objected to signing it and giving it to me personally, lest the interest should get into the hands of the "bank crowd"—the Bank of California; that was the familiar cognomen by which that party was known at the time; or that my creditors would obtain control of it, and through them, probably, the bank crowd would get control of it; but that it was all correct, and he would execute it and leave it as a

342 matter of evidence of the existing relations between us, with Mr. T. K. Wilson, the attorney, who had conducted the legal business touching the property from the inception of the tax title

matter; I agreed to this. We proceeded immediately to Mr. Wilson's office, where the paper was executed and witnessed, as you see it before you, and left it with Mr. Wilson as a declaration of the relations existing between us in relation to that property. Mr. Tilden was in the adjoining room and did not take any part in the conversation. Mr. Irvine, seeming constantly with the ghost of the bank crowd before him, made some objection to signing the paper. Mr. Wilson advised him that if it were a statement of facts, it was a reasonable demand on my part, as he was going away, and there could be no impropriety in his executing the paper. Thereupon it was executed and left with Mr. Wilson, to be kept by him as a matter of
343 evidence and a declaration, as I have just stated, of the existing relations between us two in relation to that property. We then separated, and I never saw Mr. Irvine again until his return from Europe.

(Here an intermission is taken until two o'clock p. m.)

Afternoon Session.

Present: Messrs. Wilson and Hayes, of counsel for complainant. Messrs. Garber and Botts, of counsel for defendants.

Examination of R. H. SINTON resumed:

(Plaintiff offers in evidence the said paper writing marked Plaintiff's Exhibit No. 2, being paper dated the 28th day of
344 March, 1874, signed "William Irvine," witnessed by T. K. Wilson and H. J. Tilden.)

(Obj. Mr. BOTTS: We object to its introduction in evidence, on the ground that plaintiff has not laid the foundation for the offering of that exhibit by any evidence tending to show the execution of the paper. He has not proved it by the subscribing witnesses, nor has he proved any delivery. He has neither proved the execution by the subscribing witnesses, nor accounted for the absence of the subscribing witnesses, nor has he proved any delivery of the paper.)

(It is agreed that the copy hereto annexed may be treated as the original.)

Q. 36. Mr. WILSON: The instrument of the 28th of March, 1874, to which you have referred, refers to a prospective sale or
345 disposition of the interest of yourself and Mr. Irvine in the mine. Previous to the signing of this paper had you any talk with Mr. Irvine in reference to any such proposed sale or other disposition? If so, what was said between you and him on that subject.

A. Frequently interviews, discussions, and conversations were had between us touching what disposition should be made of it,

either by a sale, or the incorporation of a company, or the individual working of it, even for its development.

Q. 37. Had you at any time obtained from Mr. Irvine any statement of expenses or disbursements incurred by him in managing this business? If so, state what it was, and when given to you.

A. (Referring to memoranda.) On the 27th of February, 1871, I received a memorandum from Mr. Irvine without caption, "Sundry expenditures, $910.25."

346 Mr. BOTTS: We object now to the witness stating the contents of a written paper.

Q. 38. You are now stating the contents of a written paper?

Mr. WILSON: I cannot consent to your cross-examining him now.

Q. 39. Mr. BOTTS: You say it was a paper—a written document that was handed to you?

Mr. WILSON: Do not answer Mr. Sinton; I object to counsel's asking the witness a question until it comes his turn for cross-examination.

Q. 40. Mr. BOTTS: I ask you whether the statement was in writting, and do you refuse to answer?

A. Under instructions of counsel I decline to answer.

347 Q. 41. Mr. WILSON: Will you proceed to state what account, or items of account, were rendered to you at any time by Mr. Irvine, as you were about to do when interrupted by defendant's counsel.

A. He rendered me an account of that amount expended, and a credit of $400, by cash received, which amount I had paid him up to that date, leaving a balance of $510.25; that was his own account.

Q. 42. Was that memorandum furnished to you by him in writing?

A. It was.

Q. 43. What became of that writing itself?

A. The writing itself I have lost or mislaid, and I cannot find it; I have hunted through all my papers for the memo-

348 randum itself.

Q. 44. When did you look for it, and how frequently?

A. I suppose a dozen times. I have gone over my papers within the last twelve months, with the special object of finding it if possible.

Q. 45. In what places did you look and examine for the purpose of finding it?

A. Among my books and papers of different kinds, and especially among a bundle of papers marked "Morgan Mine." It is most natural that I should find it among those, and I have looked critically and carefully among all those papers and cannot find said original.

Q. 46. Did you look with diligence and good faith, with a desire of finding them?

349 A. I did.

Q. 47. Where do you think it is?

A. I think it is lost or mislaid, since I cannot find it in any place.

Q. 48. Did you make any copy of that memorandum at or about the time you received it from Mr. Irvine?

A. I did, on the day I received it, fortunately.

Q. 49. In what shape is that copy?

A. In the shape of a printed letter in my letter-book, in my own handwriting—we call it printed—a letter-press copy, I mean; not a letter-press copy of it, but a letter-press copy of my copy.

Q. 50. Mr. GARBER: Why didn't you take a letter-press
350 copy of the original?

A. It was a memorandum, and I didn't know whether it would print or not.

Q. 51. Mr. WILSON: That which you copied into your letter-book was a letter to whom?

A. James G. Fair.

Q. 52 Written by you?

A. Yes, sir; it was in the body of the letter, the letter-press copy of which I now cut from my book and annexed hereto, (marked Plaintiff's Exhibit No. 3.)

Q. 53. From whom did you obtain the original memorandum to which you have referred?

A. From Mr. Irvine himself.

Q. 54. Do you know in whose handwriting it was?

351 A. Well, I could not say now absolutely that it was in his own handwriting; but all these memoranda that passed between him and myself were in his handwriting.

Q. 55. Mr. BOTTS: Just answer the question.

A. My impression is that it was in his handwriting.

Q. 56. Mr. WILSON: Did you at any subsequent time hand him the $510?

A. I did not, sir.

Q. 57. Will you look upon the paper writing marked Exhibit "A" and annexed to the deposition of George P. Ihrie, on file in this case, and, after having looked at the same, state in whose handwriting the same is, and what you know concerning it?

352 A. I have looked upon the same; the body of the paper is in my own handwriting; there is something down here at the foot of it, "Exhibit A," &c., which I do not know anything about; it is in my handwriting, all the body of the instrument; this clause: "A true copy, George P. Ihrie, San Francisco, 14th September, 1874," is in the handwriting of General Ihrie—those words.

Q. 58. The "R. H. Sinton;" whose handwriting is that?

A. The "R. H. Sinton," that is my own signature; I made that copy at the time it bears date, the 14th of September, 1874; it is a copy of the alleged account in the possession of General Ihrie at that time that General Ihrie produced from Mr. Irvine for expendi-

tures, and one thing and another, relating to the Morgan
353 mine, up to that time.

Obj. Mr. BOTTS: We object to so much of the answer of the witness as involves statements made to him by General Ihrie.

Q. 59. Mr. WILSON: Is that a true copy, as it purports to be, of a paper at that time in the possession of George P. Ihrie?

A. It is.

Q. 60. How do you know it to be a correct copy?

A. By the fact of my own signature at the bottom there, and General Ihrie's, and that we cross-examined the thing after making the copy, he holding the original and I holding the copy, and then I held the original and he held the copy; we made a double comparison so that there could be no possibility of a mistake.

354 Q. 61. Were you acquainted with the handwriting in which the original of this account was written; if so, in whose handwriting, in your opinion, was it written?

A. I am well acquainted with the handwriting of the defendant, Mr. Irvine, and my impression is it was in his own handwriting—the paper that General Ihrie showed me. Not having the paper here to look at, I could not say whether it was in his handwriting now. That is my recollection and my impression. The following words on said Exhibit "A:" "Copy of Account of Expenditures of Morgan Mine, as rendered to Gen. Geo. P. Ihrie by Wm. Irvine, September 12, 1874, there being no caption to the said account," are no part of the document exhibited to me by General Ihrie, but is a memorandum made by me on the copy.

355 Q. 62. Mr. Sinton, in looking at the account, a copy of which you made, and which is annexed to the deposition of General Ihrie, did you at the time, and do you now, recognize the expenditures, or any of the expenditures therein referred to, as items with which you were then familiar, in connection with the management of the mine by Mr. Irvine?

A. I do. They do not agree in amount, but the items were for the same purposes.

Q. 63. Explain your last answer—what you mean by saying they do not agree in amount?

A. The amount paid to Mr. Wilson, including his fee of fifteen dollars, was $105.19, which I paid to Mr. Irvine. He has got it $123.50, and has the fee of Mr. Wilson $25. But the whole amount, including his fee of fifteen dollars, was $105.19, including the purchase of the mine.

356 Q. 64. The item of John Douglass, Getting possession of the mine, traveling expenses, &c., $110.75—do you know anything of that?

A. The item is furnished in the paper I spoke of a while ago, which contains a general account of $600 for six months' salary to Douglass, and $510.25 was still due in February, 1871.

Q. 65. There is one more here to which I will call your atten-

tiention. July 23, 1873, to trip to Carson about patents, $64, carried out $32. Do you know who made that trip to Carson?

A. Mr. Irvine made a trip to Carson, and that was under the compromise arrangement—Mr. Bacon paying one-half. Hence, if that is charged at sixty-four dollars, there is a charge here for one-half. That is right. You will find a number of items in the same shape there.

357 Q. 66. Two items are charged here under the head of January 14, 1874: Telegraphing, $3.50, one-half carried out $1.75; also, January 24, telegraphing to Washington, $6.05, one-half carried out $3.02. Do you know to whom these telegrams were sent?

A. No, I could not say, sir.

Q. 67. March 24, 1874, R. A. Fish, $200, $100 carried out; is that the Mr. Fish to whom you refer?

A. That is the correspondent who got the patent—who operated in the Land Department and hurried it up. That was his fee.

Q. 68. Did you know at that time of that sum being remitted to him?

A. Mr. Irvine informed me that he had remitted it. He informed me that Mr. Fish had drawn on him at sight, as he had
358 been instructed to. Mr. Irvine informed me that he had remitted the amount, and I presume he did so.

Q. 69. The item of cash to Wilson, purchase of the mine, $123.50, under the head of July 9, 1870; did that have any reference to the tax title to which you refer?

A. It must have had reference to that, because it could not have had reference to anything else; Mr. Wilson purchased the mine originally.

Q. 70. Mr. Botts: Is that an inference of yours, or are you stating facts within your knowledge?

A. I am stating facts.

Q. 71. Mr. Wilson: This Wilson referred to in this account, is the T. K. Wilson to whom you have heretofore referred?

359 A. Yes, sir; T. K. Wilson, the attorney.

Q. 72. Will you look upon the paper writing now produced to you, dated September 8th, 1874, and signed R. H. Sinton, and state whether that is your signature, and whether you executed it at the time it bears date?

A. Yes, sir; that is the deed I made to General Ihrie, at that time.

(Plaintiff's counsel offers in evidence the paper last above referred to, marked Plaintiff's Exhibit No. 4.)

Q. 73. In whose handwriting is the body of the paper just referred to?

A. My own; and the signature is mine, too.

360 Q. 74. Of what profession or business was General Ihrie at the time?

A. He was then an ex-officer of the United States army, and was operating in stocks in California street.

Q. 75. Had he ever, to your knowledge, studied law?

A. No; he never did study law.

Q. 76. Have you ever been a lawyer?

A. No, sir.

Q. 77. In the body of this deed the words "in escrow" are written. Did you, at the time of writing that deed, know the legal significance of the words "in escrow," or what was your then understanding of the significance of those words?

Obj. (Objected to by counsel for defendants on the ground
361 that the question requires the witness to give his construction of the language of the deed, which is a matter for the court and not for the witness.)

A. That it was in the possession of a third party to keep for us.

Q. 78. You have not answered the first portion of the question, as to whether you knew the legal significance of the phrase. Answer that directly?

A. No; I did not comprehend the legal significance of the term used.

Q. 79. This deed is acknowledged on the 9th. Was that delivered on the 9th to General Ihrie, at the time of its acknowledgment?

A. Yes, sir.

362 (Plaintiff's counsel here offers in evidence deed from George P. Ihrie to the plaintiff, dated the 29th of June, 1875, with its acknowledgments and endorsements, marked Plaintiff's Exhibit No. 5.)

Q. 80. For what purpose was the transfer made by yourself to General Ihrie?

A. I owed him a large amount of money, and I transferred it to him; I made the deed to secure him; I owed him about five thousand dollars, I believe.

Q. 81. Were you aware of the transfer by General Ihrie to the plaintiff in this action; and, if so, was the same made with your consent and concurrence?

A. I was acquainted with the transaction of the transfer to Mr. Dunham; it was made, not only with my knowledge and
363 consent, but with my full concurrence.

Q. 82. Was the deed from General Ihrie to Mr. Dunham made as an absolute conveyance, or merely as security to Dunham?

A. An absolute conveyance to Mr. Dunham, with my sanction.

(Plaintiff offers in evidence the articles of incorporation of the Morgan Mining Company; the copy produced and annexed hereto being accepted as the original, marked Plaintiff's Exhibit No. 6.)

(Also deed from William Irvine, defendant, to the Morgan Mining

Company, dated April 9, 1875, the copy produced and annexed hereto being taken as the original, marked Plaintiff's Exhibit No. 7.)

(Defendants' counsel admit notice from plaintiff to pro-
364 duce the original account, a copy of which is annexed to the deposition of Gen. P. Ihrie herein as Exhibit "A;" also letter from the sheriff of Calaveras county to Ihrie, defendant, referred to by the witness Sinton, said letters being dated on or about the 14th day of January, 1870.)

(Here an adjournment is taken until Tuesday, January 2, 1877, at 11 o'clock a. m.)

TUESDAY, *January* 2, 1877.

Present: Messrs. Wilson and Hayes, of counsel for complainant; Messrs. Garber and Botts, of counsel for defendants.

Examination of R. H. SINTON resumed:

365 (It is admitted by defendants that the paper, a copy of which is hereto annexed, marked Plaintiff's Exhibit No. 8, was, at its date, served upon the defendant Irvine by the plaintiff personally, that paper being now offered in evidence by the plaintiff's counsel.)

Q. 83. Mr. WILSON: At the time of the signing of the declaration or paper of the 28th of March, 1874, at the office of Tilden & Wilson, being Exhibit No. 2, was anything said in your presence between said Wilson and Mr. Irvine as to the truth of the matter stated in said instrument, or in reference to any reason why the said Irvine should sign the same? If so, state what was said by each or either of them on that occasion or that subject.

366 A. Mr. Wilson, having read the paper aloud in our presence, propounded the question to Mr. Irvine: "Is this a statement of the fact?" An affirmation reply was made by Mr. Irvine, and Mr. Wilson said to him: "There is no reason, then, why you should not sign this paper, and leave it in my possession; that, it being true, Mr. Sinton can compel you, in a court of equity, to make this account or to account for this interest." Mr. Irvine signed it then, and it was left with Mr. Wilson, as I stated in the former part of my testimony.

Q. 84. In what capacity was Mr. Wilson, at that time, acting, as far as Mr. Irvine was concerned, and what was the relation between them?

A. He had been for a long time previous acting as the attor-
367 ney in all matters appertaining to this tax-title business and the Morgan mine in the subsequent stages and finishing of the tax title. I had had, prior to that time, a great many interviews with Mr. Wilson on that subject.

Q. 85. Did you obtain from the said Wilson a copy of the said

instrument in writing referred to? If so, look upon the paper now presented to you, and marked Exhibit No. 9, and state whether that is a copy furnished you by said Wilson.

A. Yes, sir; this is a copy of that declaration handed to me personally by Mr. Wilson.

(Plaintiff offers said paper, marked No. 9, in evidence.)

Obj. Mr. BOTTS: We object to the introduction of Exhibit No. 9, upon the ground that it does not purport to be an original paper, and the absence of the original is not accounted for.

368 Q. 86. Mr. WILSON: Have you now produced the letter-press copy of the letter to Mr. Fair which contained a copy of the memorandum received by you from Mr. Irvine, and to which you have heretofore referred in your evidence; if so, will you take from the book the said letter-press copy and annex it to your answer hereto?

A. I have the letter-press copy here in my book, written in my own handwriting, and printed, as we call it, in my book at that time, before it was enclosed in an envelope and put into the mail or the express, whichever way I sent it by. I prefer not to cut my book, but with the consent of counsel will annex a copy hereto, or read the letter so that it may be copied. The letter is as follows, that is to say:

SAN FRANCISCO, *Feb.* 27, 1871.

JAMES G. FAIR, Esq., *Va. City:*

369 D'R SIR: I have just received from Mr. Irvine a memorandum, as follows:

Sundry expenditures	$910 25
Cr. by cash	400 00
	$510 25

Let him or myself hear from you by return. In above is 6 mos. wages to Douglass, the keeper, at $100 per month.

Y'rs. truly, R. H. SINTON.

(It is agreed that the above copy shall be taken to the same extent as the letter press copy itself would be admissible, but defendant objects to its introduction in evidence being *res inter alios acta.*)

370 Cross-examination by Mr. BOTTS:

Q. 87. When did you say you first knew the Morgan mine?

A. Some time in the year 1850 or 1851; shortly after its discovery.

Q. 88. Who were then claiming to be the owners of the Morgan mine?

A. Well, I don't know that I could call them all off, or that I knew them all; but I could mention the principal ones.

Q. 89. Well, name the principal ones.

A. A. Gray Morgan, Dr. James E. Knott, James Brownsmith, a man by the name of Ulrich, a man by the name of Nichols;

371 Ulrich and Nichols were the original discoverers of the mine; William Hance, Duncan W. Murphy, I believe those were the principal ones.

Q. 90. What interest did Mr. Morgan claim?

A. I could not tell you what he claimed at that time, of course; I knew nothing of their affairs; I was a guest with them there for a couple of weeks.

Q. 91. What became of Mr. Morgan?

A. He is dead.

Q. 92. When did he die?

A. He died in Sacramento, I think, in 1859—1858 or 1859.

Q. 93. Did you qualify as administrator upon his estate?

A. Yes, sir.

372 Q. 94. Did you not get an order from the probate court to have his interest sold?

Obj. (Objected to by plaintiff's counsel as incompetent and irrelevant, and not founded upon the examination in chief; and moreover, upon the ground that the records of the probate court are the best evidence.)

Q. 95. Was his interest sold?

(The same objection.)

A. It was.

Q. 96. Who purchased it?

(The same objection.)

A. James G. Fair.

Q. 97. Did you have any interest in that purchase?

373 (The same objection.)

A. I did not.

Q. 98. You did not?

A. I did not.

Q. 99. Did Mr. Selover have any interest in that purchase?

(The same objection.)

A. He did not.

Q. 100. Do you know whether any of the other parties claiming interests in the mine had made conveyance to Morgan before his death?

(The same objection.)

A. I do.

374 Q. 101. There an absolute conveyance, was there not?

(The same objection.)

A. An absolute deed; yes.

Q. 102. Do you know whether Mr. Morgan executed a declaration of trust at that time?

(The same objection.)

A. Well, I don't know whether he executed a declaration of trust at that time, or not.

Q. 103. Do you know whether he ever executed a declaration of trust?

(The same objection.)

A. I do not personally, though it has been so stated.

Q. 104. I ask you what you know of your own individual knowledge?

375 A. I don't know as he ever did, of my own individual knowledge.

Q. 105. You never saw one?

(The same objection.)

A. I could not say that I never saw one if he made one, and could not swear that I did see one if he did.

Q. 106. You do not recollect ever seeing one?

(The same objection.)

A. That is it exactly; I do not recollect of any such occurrence.

Q. 107. Mr. Fair, you say, was in possession of the property?

A. When?

376 Q. 108. In 1869; he was in possession in 1869?

A. Yes, sir; that is, prior to the issuance of the writ of assistance under the tax title, you mean?

Q. 109. Yes, sir: and a suit was instituted against him and Mr. Selover, you state?

A. Yes, sir; and myself and several others.

Q. 110. Suit was instituted against you?

A. In that same suit. You are now speaking of the suit of Addison and others?

Q. 111. Addison and others *vs.* Fair, Selover, and Sinton.

A. Yes, sir: but, mind you, this was commenced in 1867—that suit.

Q. 112. Did that suit come to a trial?

377 A. Well, I don't believe it ever did. At all events, I did not defend it.

Q. 113. Well, you say that in 1869 it was determined between you and Mr. Fair, you acting for Mr. Selover, that it was desirable to get a tax title?

A. Yes, sir.

Q. 114. Desirable—that who should get a tax title?

A. That Mr. Selover and Mr. Fair should get a tax title. It was

all in Mr. Fair's name upon the record, but it was understood that that the tax title should be obtained for their mutual benefit.

Q. 115. Had Mr. Selover obtained an interest, then?

A. Oh, yes.

378 Q. 116. How did he obtain an interest?

A. He obtained an interest through Mr. Fair, who had purchased the property at a probate sale for the sum of one thousand dollars, agreeing to apply that sum upon the mortgage which he, Selover, held against Morgan on the mine, provided Mr. Fair would take legal proceedings against the parties in actual possession at that time and prosecute the same to the court of final resort, if necessary, he, Fair, paying all necessary expenses incidental thereto, the property being under these conditions to be owned equally by said Selover and Fair, to be first reimbursed from the first proceeds of the mine for his necessary outlays for the above purposes.

Q. 117. Was that arrangement consummated?

379 A. That arrangement was subsequently consummated by Mr. Selover.

Q. 118. Mr. Fair paid no money to the administrator on account of that purchase?

A. No, sir; I might say he paid me fifteen dollars for the deed; but that don't amount to anything here.

Q. 119. Had you no interest in that debt that you say Mr. Selover held against Mr. Morgan?

A. No, sir; never had. It was a mortgage originally to myself, and I had assigned it as security to James King, of William. Finally I made an absolute sale of it to Major Selover in some of our old business connections, and it wholly belonged to him.

380 Q. 120. Did you not administer upon Morgan's estate as a creditor?

A. Yes, sir; because he owed me, outside of that mortgage, a good deal of money.

Q. 121. None of your debt was paid out of this money—this thousand dollars?

A. No, sir; I am out some hundred and fifty dollars for expenses, that I never did get.

Q. 122. What did Mr. Morgan owe you at the time of his death?

Obj. (Objected to as incompetent and irrelevant, and not proper cross-examination.)

A. I could not tell now.

Q. 123. About.

(The same objection.)

381 A. It was many thousand dollars outside of this mortgage.

Q. 124. Did you prove your debt in the probate court?

(The same objection.)

A. I presume so.

Q. 125. Were other debts proved against Morgan?

(The same objection.)

A. I presume those things answer for themselves in the record there.

Q. 126. You do not remember?

A. I could not go into details of all those things now.

Q. 127. You settled up your administration account, did you?

382 (The same objection.)

A. No, sir; it never has been settled; I have made several efforts to get it settled, but Mr. Belknap has neglected it, and it never has been settled.

Q. 128. Never has been settled?

A. No, sir; Mr. Belknap is my attorney in the matter, and I have asked him a hundred times to take the necessary steps to settle it, but he never has done it.

Q. 129. Just answer my question; it never has been settled?

(The same objection.)

A. It never has been settled.

Q. 130. Did you make any report of your proceedings to the court?

383 (The same objection.)

A. In regard to the sale of the property, yes; undoubtedly he did, because we got the order to make the deed, and the deed was made under that.

Q. 131. You are ready now to distribute the proceeds amongst the creditors?

(The same objection.)

A. Yes, sir.

Q. 132. The property brought a thousand dollars, did it not?

(The same objection.)

A. Yes, sir.

Q. 133. Have you ever accounted to the probate court for that thousand dollars?

384 (The same objection.)

A. I paid it on that mortgage.

Q. 134. You distributed it yourself?

(The same objection.)

A. I did; yes, sir.

Q. 135. That is the way you distributed it, by paying one debt.

(The same objection.)

A. Paying one debt; it did not pay one debt; I paid so much of it.

Q. 136. You paid the whole of it on one debt?

(The same objection.)

385 A. Yes, sir; Mr. Belknap advised me that that was the only thing I could do.

Q. 137. Mr. Sinton, why did you think it was desirable that Mr. Selover and Mr. Fair should get a tax title to that property?

A. Mr. Fair had been working it for the mutual benefit of himself and Mr. Selover, expending a large amount of money; was expending and had expended large amounts of money, and it had gotten out that there were indications of its being a property of vast value, and that worked up these old claimants, some of the original owners, among others, Hance and Murphy, and then the claimants obtaining title from conveyance, purchase, and otherwise—Addison, Jack, Hays, and a number of others; and they began to examine into the matter; sent General John A. Addison to the place—to San Andreas; made an examination of the title, and
386 in the full tide of affairs, while the mine was being worked, they commenced this suit in ejectment; I think it was against Mr. Fair, Mr. Selover, and myself. Why I was put into it at that time, I don't know; and then all work ceased; that is the reason why the tax title was desirable, because they had asserted no interest or right; had taken no steps toward the recovery of the property from the Italians, Stevenot and Baccigaloupi; had expended no money in the development of it, and, in other words, had apparently taken no notice of the property for fifteen or sixteen years, and Mr. Fair and myself determined, under those circumstances, that we would obtain the tax title if it should happen to so follow along, and we would see then how the thing would terminate. It was done solely and for no other purpose in the
387 world than to cut out absolutely these claimants; there is no question about that.

Q. 138. Were any of those claimants tenants in common with Mr. Fair?

(Objected to, as incompetent and irrelevant.)

A. I am not a lawyer in fine definitions.

Q. 139. As administrator, you sold the interest of Mr. Morgan in that mine?

A. Yes, sir; I sold all his right, title, and interest in the usual verbiage, precisely, of the act as it existed at the time, under the direction of Mr. Belknap.

Q. 140. Did you know what interest he held?

A. I did not.

388 Q. 141. You never inquired?

A. I never inquired.

Q. 142. You were the administrator, and you never inquired what interest Mr. Morgan had?

A. No, sir; I sold the right, title, and interest—I think that was the way in which it was worded—of said Morgan at the time of his death, in and to that property.

Q. 143. You knew that at one time he had held it in common with Broomsmith and others?

A. Yes, sir; I knew that he had at one time held it in common with others.

Q. 144. And you knew of no change in that holding between these parties?

389 A. Yes, sir; because at the request of Mr. Morgan, I myself had drawn innumerable conveyances of interest to him; I made up the original papers; I had no abstract, and he was going to London to do something with it; and on the face of the papers it appeared that the entire property was centered in Morgan; Mrs. Irvine has those papers now.

Q. 145. And you knew of no declaration of trust that Morgan had made?

A. I do not know of any; not from my present recollection; I could not say whether I did or not; if I did at the time of the sale, there was no talk of it.

Q. 146. You say that the original papers were centered in Morgan?

A. That is what we thought, because he was going to Lon-
390 don to dispose of the property; we then thought so that it was all centered in him.

Q. 147. Then the object of getting a tax title was to better his title, and set it up against those parties who were bringing suit?

A. No, it was not about bettering anybody's title, at all; but it was with a view of putting a termination to any claim that might be set up to the property.

Q. 148. Did you suggest to Mr. Fair the proposition of letting the property be sold for taxes, or did he suggest it to you?

A. I could not, for the life of me, answer that question; I could not tell which it was, at the present time, but at all events it evolved itself in our discussion of the subject; I don't know whether I
391 could claim the honor, *or whether I could claim the honor*, or whether Mr. Fair could.

Q. 149. In that conversation between you, did Mr. Fair tell you that he had a perfect title to the mine?

A. I don't suppose Mr. Fair knew; he could not have told me so, because I don't think he knew whether he had a perfect title; he certainly could not have thought that he had one, or there would not have been a suit against us.

Q. 150. He could not have thought he had a perfect title, or he would not have wanted a tax title?

A. A legal title, no, sir.

Q. 151. Did you think that Mr. Fair would better his title by becoming a purchaser at his own sale?

392 A. No.

Q. 152. You knew better than that, did you not?

A. Yes.

Q. 153. What, then, was the scheme to get the title?

A. That we would find some confidential friend to buy the property, and, at the proper time, to reconvey it, and we would pay him for his trouble. We were willing to pay him for his trouble, if we could find some man who could be depended upon to carry on a delicate negotiation of that kind.

Q. 154. You call that "delicate;" that is the term you apply?

A. Yes, sir; very delicate. It is done here every day in San Francisco.

393 Q. 155. Why would you have another buy the property rather than Mr. Fair?

A. I have just answered that question. He would not have bettered himself.

Q. 156. If that were known that he had procured another to purchase for him, it would have been just as bad?

A. Yes, sir.

Q. 157. Then the object was to conceal that fact?

A. You can put it in that shape, if you please. The object was to obtain, if possible, that which would bear legal investigation, if questioned.

Q. 158. Did you not know that if he procured another to

394 purchase it for him he would be in no better condition?

A. Mr. Fair did not procure it.

Q. 159. It was not intended that Mr. Fair should procure it.

A. No.

Q. 160. Who was it intended should procure it?

A. I was intended that some third party should procure it, and subsequently deed it into its proper channel again.

Q. 161. It was not intended, though, that Mr. Fair should have anything to do with that arrangement?

A. By no means; understand, when the thing was commenced we were guided entirely by Judge Barber, who was Mr. Fair's attorney-at-law in all of his business at that time.

395 Q. 162. Judge Barber is dead now, is he not?

A. Yes, sir.

Q. 163. Mr. Fair was not to appear in the matter at all?

A. No.

Q. 164. There was no arrangement to be made which would not bear a legal investigation, that is what I understand you?

A. Yes, sir.

Q. 165. And you knew that if Mr. Fair procured another party to buy the mine for him at the tax sale, it would not bear legal investigation?

A. I did that.

Q. 166. What occurred with respect to this duplicate negotiation?

396 A. I think you said that in 1879 you were introduced to Mr. William Irvine, didn't you?

A. Yes, sir; I did.

Q. 167. You never knew him before?

A. I never knew him before.

Q. 168. Who introduced you to Mr. Irvine?

A. Mr. Jeff. Gatewood.

Q. 169. Where did that occur?

A. I could not say at what spot in this city; it was in this city, though.

Q. 170. Was it on the street?

A. My impression is, it was on the street, somewhere on Montgomery street, probably.

Q. 171. How came you and Mr. Irvine and Mr. Gatewood together?

397 A. Mr. Gatewood and myself have been for a large number of years very warm personal friends, and I had spoken to Mr. Gatewood on the subject, and stated to him what I wanted to do, and knowing that he had been living at San Andreas for a long time, I wanted him, if it was possible, to give me the assistance of recommending some trustworthy gentleman who was familiar with the property, and that knew something about it, and that knew what he was about, and who could arrange the matter for us, in the shape in which we wanted it—in such a shape that, at the proper time, we could obtain a deed, if we wanted it back again; Mr. Gatewood informed me that he knew just such a gentleman, and that he would introduce him to me.

398 Q. 172. That was previous to the introduction?

A. Yes, sir; I saw Mr. Gatewood, particularly to consult him on that subject. We were together every day. He used my office as his habitual visiting place when he was in town.

Q. 173. Did you and Mr. Gatewood then look up Mr. Irvine?

A. Well, I don't know how we met; I don't know whether we immediately proceeded to look him up, or whether it was a casual meeting. There was no particular hurry about it for a day or two. We saw him, and the result was——

Q. 174. (Interrupting.) You then determined to look up Mr. Irvine, or to have Mr. Gatewood do it?

399 A. Mr. Gatewood either did meet him, or we met by accident, and an introduction took place.

Q. 175. He introduced you to Mr. Irvine?

A. He did.

Q. 176. What did you say to Mr. Irvine?

A. We introduced the subject——

Q. 177. (Interrupting.) How did you introduce the subject; what did you say?

A. I could not say.

Q. 178. Let us have that conversation—what you did.

A. The conversation was simply that I informed Mr. Irvine of the state of affairs, and that I wanted to get the tax title; that
400 there was that property for sale, and I wanted to get the tax title to it. I did not inform him of the other facts connected with the matter, as I did not want him to be in a position of being cognizant of anything connected with it, other than the fact that I wanted to get the tax title for that property.

Q. 179. That *you* did.

A. Yes, sir.

Q. 180. You told Mr. Irvine that this property was for sale?

A. Yes, sir; I don't know whether at the time he was not already advised.

Q. 181. (Interrupting.) And that you wanted to get the tax-title to it?

A. Yes, sir.

401 Q. 182. What did he say?

A. Well, it was agreed——

Q. 183. (Interrupting.) What did he answer to that?

A. The result of the answer was that he agreed to do it for me.

Q. 184. He agreed to do what?

A. To get the tax-title for me.

Q. 185. To get the tax-title for you?

A. Yes, sir.

Q. 186. Did he agree to convey to you that tax-title?

A. No, sir; he did not agree to convey to me that tax-title, but he agreed to get it for me.

Q. [186½.] To get it for *you?*

402 A. Yes, sir.

Q. 187. Not to have it knocked off to you at the tax sale?

A. No, sir.

Q. 188. That was not to be done?

A. No, sir.

Q. 189. To whom was it to be knocked off; that was not agreed on at all?

A. No, sir; it was not agreed that he should take any particular steps; that was to be left to him; it was to be knocked off to him or to anybody else he chose.

Q. 190. Did you not warn him that he was not to have it knocked off to you?

A. There was nothing of the kind said.

403 Q. 191. But if you asked him to get the tax title for you, would he not naturally have it knocked off to you?

A. I don't know that he would; I simply requested him to get the tax title.

Q. 192. You simply requested him to get the tax title?

A. Yes; which would be for him——

Q. 193. (Interrupting.) Did you not tell him that you did not want the tax title knocked off to you?

A. Probably I did; I could not say.

Q. 194. In whose name was he to get it; in yours?

A. No.

Q. 195. Or Mr. Fair's?

404 A. No.

Q. 196. Or Mr. Selover's?

A. No; the probabilities were that he was to get it in his own name.

Q. 197. Was there an agreement on his part—did he agree to purchase that title and convey it to you?

A. No; he did not—not in words.

Q. 198. Did he do it at all; did he do it by his looks?

A. The implication of the whole thing was——

Q. 199. (Interrupting.) I don't want any implication. Just answer the question.

A. Then there was nothing.

(Here a recess is taken until two o'clock p. m.

405 Afternoon Session.

Present: Messrs. Wilson and Hayes, of counsel for complainant; Messrs. Garber and Botts, of counsel for defendants.

Cross-examination of R. H. SINTON resumed:

Q. 200. Mr. BOTTS: You said that in making an arrangement by which Mr. Selover and Mr. Fair might procure a tax title to the Morgan mine, you proposed to do it in such a manner that it would bear the strictest judicial investigation?

406 A. I so stated.

Q. 200. Did you not intend by that that if the question of the obtaining of this tax title should ever become the subject of investigation, the party who obtained the title might be able to testify, honestly, that it was done without any collusion or agreement with either of these parties?

A. I did.

Q. 201. Either directly or indirectly?

A. Directly or indirectly.

Q. 202. You expected in making that arrangement that Mr. Fair and Mr. Selover would obtain a title from Mr. Irvine, the purchaser, did you not—a tax title?

A. Ultimately; yes, sir.

407 Q. 203. Then there was no agreement with Mr. Irvine made by you that he should convey that title when it was obtained, either directly or indirectly, to Mr. Fair or Mr. Selover?

A. No; but it was to myself. He did to myself; that is, that was the understanding.

Q. 204. What was the understanding?

A. The understanding was that he was procuring that tax title for me.

Q. 205. And that he was to convey that tax title to you?

A. That, sir; to come back to that word "implied" again, that was the implied understanding between us—between two gentlemen.

(Obj. Mr. BOTTS: I move to strike out the answer, upon
408 the ground that it is not responsive to the question, and that it is stating the inference and conclusion that the witness drew as to the construction of the agreement, and not a statement of the agreement itself.)

The WITNESS: There was no agreement about it.

Q. 206. When you say "There was no agreement about it," what do you mean?

A. That there was no written or oral agreement; that at any future time that particular thing should be transferred to anybody or to any person.

Q. 207. When do you say this conversation occurred with Mr. Irvine upon your introduction to him by Mr. Gatewood; what period do you fix?

A. Some time in the summer of 1869.

409 Q. 208. Summer or spring?

A. I don't know whether it was in the summer or spring, but prior to the tax sale; whether the thing was advertised at time or not, or whether the judgment had been taken or not, I do not know; it was some time, probably, after July, when the tax became delinquent; I don't know whether the taxes had become delinquent at that time, but the taxes were delinquent, and it was determined to let the taxes pass and not pay them.

Q. 209. It was before December?

A. Yes, sir, some time before December.

Q. 210. I will ask you to state, as nearly as you can, the time when this occurred?

410 A. It was during the year 1869, in the after part of it, perhaps some time in the middle or after part of the year.

Q. 211. That was before the sale took place?

A. Of course, necessarily.

Q. 212. At that time had you any funds in the hands of William Irvine?

A. No.

Q. 213. Did Mr. Fair have any funds in his hands, to your knowledge?

A. To my knowledge, no.

Q. 214. At the time of the sale, under the tax judgment, did you have any funds in Mr. Irvine's hands?

A. No.

Q. 214. Did Mr. Fair, to your knowledge, at that time,
411 have any funds in Mr. Irvine's hands?

A. No.

Q. 215. Did you ever pay Mr. Irvine any money in connection with this purchase of this mine?

A. I did.

Q. 216. When was that first payment made?

A. I forget the date; I gave you the dates the other day; it was $105.19.

Q. 217. You state you received another check for the same amount: "March 15th I acknowledged the receipt of another check for that amount, which I paid to Mr. Irvine on the day I received it."

A. Yes, sir; that check was on Flood & O'Brien.

412 Q. 218. How was that check drawn, payable to whose order?

A. I think it was probably drawn to my own order. I could not say now, but I got the money from Flood & O'Brien. The check was on Flood & O'Brien.

Q. 219. You drew the money from Flood & O'Brien?

A. I did.

Q. 220. Did you pay that money to Mr. William Irvine?

A. I did.

Q. 221. You are sure of that?

A. Yes.

Q. 222. Did you take a receipt for it?

A. No.

413 Q. 223. You did not?

A. No.

Q. 224. Why did you not take a receipt for it?

A. Well, we discussed that matter and concluded it would not do that there should appear to be any privity between us at all. It was a matter passed on honor between us right direct. I handed him the money. That was a part and parcel of the innocence of the purchase.

Q. 225. Did you imagine that, if you did not take a receipt, Mr. Irvine would be able to testify upon the stand, if he was put there, that there had been no understanding, which he could not do if you I did not take the receipt?

414 Obj. (Plaintiff's counsel objects to the question, as calling for the thoughts and imaginations of the witness.)

A. Mr. Irvine suggested; I asked him for a receipt, and Mr. Irvine suggested that it would be a very improper sort of a thing that he should give a receipt at all, acting in the capacity in which he was, in case the matter should be questioned hereafter.

Q. 226. Did you concur with him in that view?

A. I concurred for the reason that I did not receive any receipt.

Q. 227. But had you not arranged this matter so that it should stand the most thorough investigation?

A. We endeavored to do it, both Mr. Irvine and myself.

415 Q. 228. About that time did you pay any other money to Mr. Irvine?

A. Subsequently I did; yes, sir,

Q. 229. But about that time?

A. Subsequently, I say.

Q. 230. How long subsequently?

A. Well, I could not tell now, because it was made up in this amount of credit four hundred dollars.

Q. 231. Can't you tell me something about the time?

A. Well, it was between that and the 27th of February, 1871, that I paid him the entire four hundred dollars.

Q. 232. How did you pay him that four hundred dollars; in what sums?

A. That I could not tell; upon one occasion he had to
416 send suddenly to Calaveras county, I recollect, and I gave him fifty dollars. At subsequent times I just handed him that money—to the extent of this credit that he made upon that memorandum.

Q. 233. Did you pay him any other money than that sum you mentioned—$105.19—prior to his obtaining the sheriff's deed?

A. Prior to his obtaining the deed, no; without having kept an account of it in that way, I don't think, prior to the obtaining of the deed after that, that I did.

Q. 234. March 15th, you acknowledged the receipt of the money from Mr. Fair, and you say it was on March 15th that you paid it?

A. Well, I acknowledged the receipt on that day.

417 Q. 235. This first payment was not made prior to his obtaining the deed?

A. Oh, yes; it was long prior.

Q. 236. You say here (referring to testimony of witness given on 29th ultimo) February 27th, 1871.

A. That was the credit of four hundred dollars; but the $105.19 was paid in January, it seems to me, or February, 1870, immediately after the sale, when he advised me of the amount that the property had cost; that amount also including fifteen dollars for T. K. Wilson's fee; then the first check came, and then, in March, I paid him the $105.19.

Q. 237. "On March 15th, 1870, I acknowledged the receipt of the duplicate of the above," you say, and that was the day that you paid it to Mr. Irvine?

A. Yes, sir.

418 Q. 238. And you paid him no other sum of money until after he had procured the deed, did you?

A. No; my recollection don't serve me that I paid him any more until about the time the messenger was dispatched to take possession of the mine.

Q. 239. Did you keep an account of these moneys that you paid to Mr. Irvine?

A. No more account than that I had a general correspondence with Mr. Fair.

Q. 240. Did you not say the other day that you were making these statements from memoranda?

A. Yes, sir.

Q. 241. You did make a memorandum of the money that you paid to Mr. Irvine?

419 A. In my letters to Mr. Fair.

Q. 242. Where did you get any other moneys that you paid to Mr. Irvine?

A. I got them from Mr. Fair.

Q. 243. How did Mr. Fair send it to you?

A. He either sent it by check, or—I believe generally—always by check, I believe.

Q. 244. Did you keep any account of the checks that you had received from Mr. Fair, and what you had done with them?

A. By my letters.

Q. 245. Did you keep no account of the moneys?

A. No.

420 Q. 246. Did you receipt to Mr. Fair for the money?

A. No; I think it probable the checks were all drawn to my order, and I endorsed them and drew the money.

Q. 247. All the money that you paid Mr. Irvine was money that you received from Mr. Fair?

A. Yes, sir; I advanced fifty dollars upon this occasion of sending a special messenger, and wrote to Mr. Fair, who returned me the money.

Q. 248. Can you remember or fix the time when you furnished the money for that special messenger?

A. I gave it to you here the other day; it strikes me I did.

Q. 249. You can do it now again, can't you?

421 A. I cannot do it again now without reference to my papers and books, and all that sort of thing.

Q. 250. I should like to know the date of that.

A. I think to-morrow morning I can state that.

Q. 251. And the dates of the payment of all the different sums that you paid him?

A. I think so.

Q. 252. Who was the special messenger that was sent?

A. That I do not know; that was entirely his business, his affair entirely; I never saw the man.

Q. 253. You stated that there were some negotiations which took place between Mr Fair and Mr. Selover on the one hand, and

422 Mr. Irvine on the other, for the conveyance of this property to Mr. Selover and Mr. Fair.

A. Yes, sir.

Q. 254. Were these payments which you are speaking of now made before or after those negotiations?

A. Long before.

Q. 255. Did you ever pay any money to Mr. George Irvine in connection with this matter?

A. I don't know. If I ever handed any money to George Irvine, it was for William Irvine.

Q. 256. Did you ever hand any money to Mr. George Irvine for Mr. William Irvine?

A. That I do not recollect. I could not tell you that to save my soul.

423 Q. 252. Did you not just now state that you paid that all to Mr. Irvine?

A. This $105.19 I paid to Mr. Irvine. It might have been the case that I handed to George Irvine fifty dollars to give to William Irvine. I might do it on the street—hand him money to give to William Irvine.

Q. 258. Did you give any sum of money to Mr. George Irvine and tell him to give it to Mr. William Irvine and not tell him where it came from?

A. I could not say; that may be.

Q. 259. You might have?

A. I could not say.

Q. 260. You may have done so?

A. I may have done so; I may have done such things. A
424 great many things I have had to do in this community in that regard. I don't know that I ever sent you any.

Q. 261. After the payment of that $105.19, when did you next have any conversation with Mr. Irvine in relation to this property?

A. Well, they were almost constant; not daily, perhaps, and may be not weekly; but very frequently, along in the natural progress of things in a matter of that kind, towards completion.

Q. 262. When was it that you told Mr. Ivine that all that you had done in and about this matter was done on behalf of Mr. Fair?

A. My impression is that it was not until after the issuance of the sheriff's deed, but whether before or after I cannot state
425 upon oath in the premises. My strong impression is that it was after the issuance of the deed, but whether before the issuance I could not say, and I won't say, because it would be a matter that I could not tell positively.

Q. 263. You think it was after the issuance of the sheriff's deed?

A. That is my strong impression, that it was after the issuance the of sheriff's deed; but whether before or after I could not positively say.

Q. 264. Until that time Mr. Irvine had never been apprised that Mr. Fair had any connection with this matter?

A. Until the time that I informed him he had never had; no, sir.

Q. 265. And when you did notify him, did you not say that Mr. Fair was with you?

426 A. No; I did not.

Q. 266. When you did notify him, then, of this fact, did you ask him to make a conveyance to Mr. Fair?

A. I do not recollect whether I asked him at that time to make a conveyance or not.

Q. 267. Did you ever ask him to make a conveyance of this property to Mr. Fair?

A. In direct terms, I don't think I ever did; I merely informed him that it was intended for the benefit of Mr. Fair and Mr. Selover.

Q. 268. Don't you know whether you asked him at that time to make a conveyance to Mr. Fair or not?

A. I do not think in direct terms I ever asked him to
427 make a direct conveyance.

Q. 269. Did you ever ask him to convey this property to you?

A. No.

Q. 270. Did you ever ask him to convey this property to Mr. Fair, or to Fair and Selover?

A. No.

Q. 271. Did you ever ask him for what compensation for his services he would agree to convey it?

A. I did.

Q. 272. When was that?

A. That was long subsequent, you know, to the obtaining of the deed and his possession of the premises.

Q. 273. Long subsequent to his obtaining the deed and
428 getting into possession of the premises?

A. Yes, sir.

Q. 274. And that was the first time that you ever asked him for what compensation he would convey to Mr. Fair?

A. No; to convey to Mr. Fair, yes; not the first time I ever asked him what he would expect for his services, by a long time.

Q. 275. Can you tell me now the sum total of Mr. Fair's money that you paid to Mr. Irvine?

A. By the letter of February——

Q. 276. (Interrupting.) I want to know if you know of the amount, and if it is necessary to refresh your memory, you can do it.

A. By the letter——

429 Q. 277. I do not ask you about any letter; I ask you if you can tell me the sum total of Mr. Fair's money that you paid Mr. Irvine?

A. Four hundred dollars.

Q. 278. You are willing to swear that you paid him four hundred dollars?

A. Yes; because he acknowledged it himself; I will swear that I paid him four hundred dollars.

Q. 279. Do you swear that you paid him four hundred dollars?

A. Yes, sir.

Q. 280. In addition to the sum of $105.19?

A. No, sir; including that.

Q. 281. Then you paid him $294.81 over and above the $105.19?

430 A. If your substraction is correct, yes, sir; the balance of four hundred dollars.

Q. 282. You cannot tell me the different payments you made constituting that $294.81?

A. No; there was no account kept of it.

Q. 283. You recollect one payment of fifty dollars?

A. There was one of fifty dollars that I handed him at the time this messenger was sent.

Q. 284. Deducting the fifty dollars leave a balance of $244.81; did you pay that in one sum or several sums?

A. Probably in several sums; two or three, perhaps.

Q. 285. This sum of $294.81—the remainder of the $400—

431 after deducting the $105.19, you paid him that sum at several times, and all after the time that he obtained the sheriff's deed?

A. I think so—yes.

Q. 286. How long was it after he obtained the sheriff's deed that you asked him what compensation he would expect for his services?

A. Well, I could not tell you; a month or two, perhaps two or three months maybe; I could not tell though, not having made a note of it.

Q. 287. Was that sum of $294.81 paid him prior to that conversation that you had with him?

A. Well, probably it was.

Q. 288. Do you know whether it was or not?

432 A. No, I do not; I could not state that.

Q. 289. Was it not your object to get this transfer from Mr. Irvine to Mr. Fair as soon as the title had been completed in him by the receipt of the sheriff's deed?

A. Well, I don't know that we pressed the matter particularly; we were not in a great hurry; the thing had been accomplished; and having every confidence in Mr. Irvine, we were not in any special hurry to have it done—within twenty-four hours, or a week or a month, probably.

Q. 290. But after the sheriff's deed had been obtained, your next attempt was to procure that conveyance for Fair, was it not?

433 A. Yes, I think it was, some time after.

Q. 291. And then it was that to your surprise Mr. Irvine said he would not convey for less than twenty thousand dollars?

A. No; Mr. Irvine did not say that to me; it was a matter of negotiation between him and Mr. Fair, in his place in Front street; they had quite a talk together; Mr. Fair and I went down there together, and I left them together there.

Q. 292. Do you know what time that was?

A. Sometime subsequent to this time; I could not tell you the

date; Mr. Irvine was then in possession under this writ of assistance; I left them there together, and Mr. Fair reported to me the fact that Mr. Irvine demanded twenty thousand dollars.

434 Q. 293. You did not hear the conversation between Mr. Fair and Mr. Irvine?

A. No; I did not; I left them together.

Q. 294. Mr. Fair reported to you the fact that Mr. Irvine demanded twenty thousand dollars?

A. Yes, sir.

Q. 295. What did you say when Mr. Fair told you that?

A. What did I answer?

Q. 296. What did you say?

A. What did I say to whom?

Q. 297. To Mr. Fair.

A. Well, I don't know what I said to Mr. Fair, whether I said anything or not—what comment I did make, I could not recollect; the thought struck me that under the circumstances—I can

435 tell you what my thoughts were.

Q. 298. You did not tell Mr. Fair that by an agreement between you and Mr. Irvine, Mr. Irvine was under a legal obligation to convey to him?

A. Not to him, but to me; not any legal obligation, but simply the obligation of a man who acts in such a fiduciary capacity.

Q. 299. But a man who acts in a fiduciary capacity can be compelled to meet his obligations, can he not?

A. Well, I am not going into the question of law involved; but if, in the case of a matter between you and me of that kind, I got possession of property, I should consider myself under obligation to dispose of it as you would direct.

436 Q. 300. You mean to say it was a point of honor?

A. That is it, exactly; a point of honor, thoroughly understood before any steps were taken.

Q. 301. There was no obligation, either legal or equitable?

A. I don't know what you mean by "equitable," but there was no legal obligation.

Q. 302. I mean what could be enforced in a court?

A. You can put it in what shape you please.

Q. 303. You say that the negotiation with Mr. Fair was broken off?

A. It was.

Q. 304. What do you mean by that?

437 A. Mr. Fair deemed the demand exorbitant for the services rendered, and would not pay it.

Q. 305. Did Mr. Fair tell you that that he considered it exorbitant?

A. He did; for the service rendered.

Q. 306. Did he say what he was going to do about it?

A. No; I don't know that he made any threats.

Q. 307. Did not you say anything about it?

A. Nothing that I specially recollect.

Q. 308. You say that the negotiation was afterwards renewed?

A. Yes, sir.

438 Q. 309. Upon what basis was that negotiation renewed; how came it to be renewed; I will ask you that. How came that negotiation to be renewed; by whom was the negotiation recommenced?

A. Major Selover came to California from New York, and it was at his instance that the matter was revived.

Q. 310. Did he revive it?

A. He was the main instrument in its revival.

Q. 311. Were you in any manner assisting in that negotiation?

A. Not while Mr. Selover was present in California, except incidentally, probably. Maybe I might have advised with both Mr. Irvine and Mr. Selover. In fact, I know I advised with Mr.

439 Irvine in the premises, and it is equally probable that I must have advised with Mr. Selover.

Q. 312. Did Mr. Selover find any fault with you that you had, in attempting to obtain the tax title, lost the property in the mine to him and Mr. Fair?

A. Not by any means, because he knew what I had been doing all the time.

Q. 313. It was with his knowledge and consent that it was done?

A. Yes; equally with Mr. Fair.

Q. 314. Were you present at any meeting between these parties; did Mr. Selover and Mr. Irvine meet together, to your knowledge?

A. I was not present at any of their meetings, if they had any.

440 Q. 315. How long was Mr. Selover here?

A. Three or four months.

Q. 316. Was any result arrived at before he went away?

A. None.

Q. 317. Were there any conferences held upon the subject after he went away?

A. There were.

Q. 318. Between whom were those?

A. Mr. Irvine, Mr. Samuel M. Wilson, and Col. Barnes, I being present.

Q. 319. Were you taking any part in it all?

A. I was more in the light, in that negotiation, of a meditator than in any other light you could put me in.

441 Q. 320. What do you mean by your being a mediator?

A. Between what they donominated the exorbitant demand of Mr. Irvine and the position that I occupied, as having employed or obtained the services of Mr. Irvine to obtain this tax title; I was between two fires.

Q. 321. You wished Mr. Irvine to convey this property to Mr. Selover, did you not?

A. I did. I wanted to see him well paid for what we esteemed

to be a great service performed. They esteemed the demand exorbitant, and would not accept it; that is the gist of the whole thing.

Q. 322. That service was the assistance that he had rendered them in obtaining a false and pretended title to the mine, was it not?

442 A. It was for the service performed in obtaining an absolute tax title to the property.

Q. 323. That was the service?

A. Yes, sir.

Q. 324. In obtaining for himself a tax-title to the property?

A. I did not say that: "for himself;" leave that out.

Q. 325. In obtaining a tax-title, then, for Mr. Selover and Mr. Fair?

A. No, sir; in obtaining a tax-title that was to come to me; that is, I had employed him to do it; it was ultimately to go to Mr. Selover and Mr. Fair.

Q. 326. Did you agree to pay him for that service?

443 A. In the conversation in the origination of the whole matter that I would do that which was right and proper for the service to be rendered.

Q. 327. Who was to judge as to what was right and proper; you and he?

A. I suppose, as between any two gentlemen, it was to be determined between ourselves.

Q. 328. If Mr. Irvine had done all that you expected of him as an honorable man, he would have made the conveyance to Mr. Fair and Mr. Selover, would he?

A. No, sir; made it to me.

Q. 329. Made it to you?

A. He would; he would have made it to them, or to anybody that I would have indicated.

444 Q. 330. That would have been no service to you unless he would swear, when it came to a judicial investigation, that he bought the property in his own right, would it?

Obj. (Objected to by plaintiff's counsel, as asking of the witness questions of law, and as being otherwise incompetent and irrelevant.)

A. Not being a lawyer, I cannot answer you whether it would or not.

Q. 331. You spoke of the service for which he was to be compensated?

A. I did.

Q. 332. Now, then, did you include in that service the necessity of his testifying in a judicial investigation that he had bought this property in his own right, and for his own purposes; did

445 you include that; that is my question?

Obj. (Objected to by plaintiff's counsel, as asking for the secret and unuttered thoughts of the witness.)

A. There were no items specified in the service.

Q. 333. You have spoken of services to be rendered by William Irvine, for which he was entitled to compensation; did these services include the necessity of his testifying in the judicial investigation which you say you anticipated might possibly arise, that he had bought the property in his own name, and for his own sole use and benefit?

Obj. (The same objection.)

A. He did not buy it for his own use and benefit.

446 Q. 333. (Repeated.) Was that included in the service that he was to render?

A. The service he was to render was to obtain the tax title; there was no specification as to the extent to which that service would go.

Q. 334. If there had been a judicial investigation instituted into the acquisition of this tax title by Mr. Fair and Mr. Selover, as you proposed to obtain it for them, would it have been of any avail for them, deriving it, as you intended they should do, from William Irvine, unless they could establish the fact that William Irvine bought that property for his own use and benefit?

447 Obj. (Objected to by plaintiff's counsel, on the ground that the question involves a simple proposition of law, and is incompetent and irrelevant.)

A. Not being a lawyer, and being unused to legal refinements, I cannot answer the proposition.

Q. 335. Did you not state a while ago that it was your object, in engineering this matter, to obtain a title to this mine that would stand a judicial investigation?

A. It was.

Q. 336. And did you not state that you knew it would not stand a judicial investigation if, by any previous agreement, they were to have this title, directly or indirectly, as the result of this sale?

448 A. I stated that that was my impression, and I derived that from an extensive dealing in tax titles in San Francisco.

Q. 337. And that is your impression now, is it not?

A. That is my impression now; but I cannot answer your refined legal questions.

Q. 338. That is your impression now, that it would have been of no avail to them to have so derived the title, unless they could have shown that William Irvine bought this property for his own sole use and benefit. That is your impression now, is it not?

A. My impression now is, and always has been, that a tax title to any property will not benefit the holder or claimant if there is any privity between him and the acquiring of the tax title.

449 Q. 339. Do you know what was the result of the second negotiation between Mr. Selover and Mr. Fair on the one

side and Mr. Irvine on the other, as to Mr. Irvine's conveying this property to them?

A. Yes; I know the result; everybody knows that, I suppose. The result was nothing.

Q. 340. Was there any proposition made by you for Mr. Irvine?

A. There was.

Q. 341. Was that in writing?

A. No.

Q. 342. Was that proposition accepted by Mr. Fair and Mr. Selover?

A. I presume not, in the light of subsequent events. That I do not know, of course. I could not tell you whether it was or not.

450 Q. 343. When this negotiation was conducted, neither Mr. Fair or Mr. Selover was present?

A. When this Barnes and Wilson business transpired, neither of them.

Q. 344. At that negotiation neither of them was present?

A. No, sir.

Q. 345. How far did that negotiation proceed, to your knowledge?

A. That negotiation resulted in Mr. Irvine's agreeing to take five thousand dollars cash and fifteen thousand in a year, secured on the property, or guaranteed something to that effect. It was conditionally entertained, Mr. Barnes and Mr. Wilson to advise with their principals.

451 Q. 346. That is, you mean by their principals, Mr. Fair and Mr. Selover?

A. Mr. Fair and Mr. Selover; yes, sir. Whether they went further than that between themselves is a matter, of course, beyond my knowledge.

Q. 347 Did you ever hear anything further from Mr. Selover on that subject?

A. Not a word after that proposition was made.

Q. 348. Mr. Selover was an old partner of yours, was he not?

A. Yes, sir.

Q. 349. You were here in business together for a long time?

A. Yes, sir; that is, about three years.

Q. 350. Doing a pretty extensive business?

452 A. A very heavy business.

Q. 351. You were intimate friends at this time, were you not?

A. Very.

Q. 352. Did you have no communication with Mr. Selover at all upon that subject after this time?

A. I advised him simply of this thing.

Q. 353. You advised him of it?

A. I advised him of what had transpired in Mr. Wilson's office.

Q. 354. Did you state, on your examination here a while ago, that you did not know whether or not he had ever been advised of it?

A. As to the principals between themselves, I did.

453 Q. 355. You advised Mr. Selover of it?

A. I advised him of the final action that had taken place there; Mr. Selover did not seem fit to give me any replication thereto.

Q. 356. And you never heard from Mr. Selover in relation——

A. (Interrupting.) He did not deign to give me any answer in relation to the proposition at all; it was a very queer thing, and he and I afterwards had some pretty sharp words about it.

Q. 357. When he came out here you did talk about it, did you?

A. We had some pretty sharp words about it, as to the neglect of his duty as a correspondent with me.

454 Q. 358. Why were you so much offended that Mr. Selover did not communicate with you about it, if you had no interest in the matter?

A. Then I had an interest in the matter, for long prior to that Mr. Selover had agreed to give——

Q. 359. (Interrupting). Oh! you had an interest?

A. Agreed to give me an equal interest with himself.

Q. 360. Oh! Mr. Selover?

A. Yes, sir.

Q. 361. At what time was that; the time that Mr. Selover did not answer you; about when was that; about the time of the Barnes and Wilson negatiotion?

A. If you can place the time of the snow blockade, I can tell you, Mr. Selover went from here just prior to that, and

455 slipped through.

Q. 362. Was it about the time that Colonel Barnes and Mr. Wilson were conducting this negotiation that you wrote to Mr. Selover, and he would not answer you?

A. It was immediately after that time; to fix the year, it was at the time of that great snow blockade, you know; Mr. Selover left here just before the blockade, and slipped through; and this thing took place afterwards, immediately succeeding the Barnes-Wilson, or Wilson-Barnes, as you choose to call it, negotiation.

Q. 363. When did Mr. Selover agree to give you one-half of any interest he might acquire in the Morgan mine?

A. I think it was in June of the year 1867; that is my recollection now; it may have been before or after; it may

456 have been 1866 and may have been 1868.

Q. 364. You do not wonder so much now that when Addison and others brought a suit against Mr. Fair and Mr. Selover, they should have included you, as you had an interest?

A. You can draw your own inference about that.

Q. 365. Did you not answer in that suit, denying that you had any interest?

A. No; I do not recollect that I put in any appearance; I don't

know that anybody ever did for me; I do not recollect; I certainly employed no lawyer, or paid one; I merely had the verbal word of Mr. Selover; that is all I ever had of him.

Q. 366. What consideration was there for that; was it on a settlement of accounts between you?

457 A. No, we never have settled to this day.

Q. 367. You have not settled either the Morgan estate or your matters with Mr. Selover?

A. No, sir.

Q. 368. What consideration was there for his making that promise?

A. Probably his good will more than anything else; there were a great many things that I had conducted for him; I don't know; possibly it was more good will than anything else.

Q. 369. Merely verbal, was it?

A. That is all, sir.

Q. 370. You really had no interest in the Morgan mine in 1871, either legal or equitable, had you?

458 A. Except in the mere matter of the promise of Mr. Selover that he would give me, upon the final settlement of the matters relating to the mine—he and I would be equally interested in it; I had his verbal promise for that; a great many men promise a great many things and never keep their promises.

Q. 371. There was no consideration for the promise?

A. No consideration for the promise; no, none whatever.

Q. 372. Well, you do not know what Mr. Fair replied to this proposition of Mr. Irvine to convey to him, for five thousand dollars down and fifteen thousand in one year, guaranteed?

459 A. No; he never communicated with me, or I with him, about it; we were somewhat off in some of our business; whether Colonel Barnes communnicated it to him or not, I do not know.

Q. 373. What do you mean by being "off"?

A. For instance, if you and I had some trouble, and disagreed, and did not communicate with each other, I should say we were "off;" we had some little dispute about some matter.

Q. 374. You were not on friendly terms?

A. We were not then.

Q. 375. Are you now?

A. We are; it was a misunderstanding—a misapprehension; and like two gentlemen we came together again.

460 Q. 376. Now you agree in most everything, do you not? A. Well, no; we do not.

Q. 377. Do you differ any about this Morgan mine?

A. I don't know that we differ particularly about the Morgan mine.

Q. 378. Did not you and Mr. Fair differ very much about this title and stock held by Mr. Irvine?

A. Fair and myself have never exchanged a word upon the subject of the stock held by Irvine.

Q. 379. Did you not know that Mr. Fair had sued Mr. Irvine, claiming the whole of this stock?

A. Mr. Fair can sue anybody he pleases; it is none of my affair; but we are in very good accord, as gentlemen usually are.

461 Q. 380. How long after that was it that a certain letter was written by Mr. Irvine to Mr. Fair?

A. If my memory serves me right, this was in December—this Wilson-Barnes negotiation, and—well, it was about October, the fall of the next year—the notification to Mr. Selover and to Mr. Fair. It was the fall of the next year—October I think—September or October of the fall following this December of the Barnes-Wilson negotiation, that he notified them both. Mr. Irvine told me he had notified Mr. Fair in writing, and that he had notified Mr. Selover in writing, and Mr. Selover returned me the notification that Mr. Irvine had sent him.

Q. 381. Have you got that letter?

462 A. No, sir; I have not got that letter.

Q. 382. What became of it?

A. Well, I don't know what became of Mr. Selover's letter.

Q. 383. You do not know what became of the letter that Mr. Irvine addressed to Mr. Selover?

A. No; plaintiff's counsel has got the original papers sent to Mr. Selover, but what became of Mr. Selover's letter to me I do not know.

Q. 385. You say Mr. Samuel M. Wilson has that letter?

A. No, it is not a letter; it is a notification.

Q. 386. The one that Mr. Selover sent back to you?

463 A. The one that Mr. Selover sent back to me; it is in Mr. Irvine's handwriting.

Q. 386. Is that the letter that you were undertaking to tell the contents of the other day?

A. Yes, sir; that is the one; I went and searched for it and found it subsequent to our last meeting, and gave it to Mr. Wilson.

Q. 387. Did you have anything to do with the concocting of that notification?

A. Mr. Irvine showed me the paper before he sent it.

Q. 388. Did you recommend it or advise it?

A. Well, it was one of those things that he told me he intended to do; that he intended to take that step, and then it brought

464 up the matter between him and myself, and I wanted to know how I was to come out; we talked it over sitting on the steps of the custom-house.

Q. 389. Did you have anything to do with the concocting of that notification?

A. Mr. Irvine wrote the notification himself, and we discussed it.

Q. 390. Did you read it?

A. Yes, sir; and we discussed it.

Q. 391. Let us hear what discussion took place between you and him.

A. I could not tell you the words; but the tenor of the conversation was, the burden of my song was, that I wanted to know where I was to come out in this thing. Under the previous arrangement with Mr. Selover I was to receive one-quarter of
465 the property, and Mr. Irvine assured me, upon the honor of a gentleman, and all that sort of thing, "you shall have one-quarter of everything that comes out of the property."

Q. 392. Did you advise the sending of that notification?

A. No, I did not; I did not advise it, because he had determined on it.

Q. 393. You expressed no opinion about it?

A. Yes, sir; I expressed an opinion about it.

Q. 394. What opinion did you express about it?

A. That it would bring an issue right direct upon him at once.

Q. 395. A desirable issue you thought, did you not?

466 A. Well, I don't know as I thought it a desirable issue, because the whole thing would cast me adrift, if I did not have an understanding with him, utterly.

Q. 396. You would be cast adrift unless you had an understanding with him?

A. With Mr. Irvine, yes, sir; Mr. Selover had failed to respond to my notification, and Mr. Fair ditto. As I told you, we were out of correspondence at the time, and I was left without any *status* or standing anywhere, with any body, and I asked Mr. Irvine, in all candor, how this thing was to affect me, and he assured me then, as he did after that, time and time again, and frequently and ever afterwards until the obtaining of the patent, and until the transfer to General Ihrie of the equality of him and myself in the premises, subject to the payment of the necessary expenses.

467 Q. 397. Did you say you had a copy of the letter of the sheriff to Mr. Irvine?

A. I did not say that.

Q. 398. What memorandum did you make of it?

A. I simply wrote to Mr. Fair on that day that Mr. Irvine had shown me a letter from the sheriff of Calaveras county,

Q. 399. Is not that letter in your letter book?

A. Yes, sir.

Q. 400. Did you express there the date of the letter?

A. My letter read: "He has just showed me a letter from the sheriff of Calaveras county, stating," &c. That is the way it commenced, I believe; and probably the sheriff's letter was written a day or two before that.

468 (Defendant's counsel produces letter from the sheriff of Calaveras county to Mr. Irvine, asked for by counsel for plaintiff on the 29th ultimo, said letter being dated January 10, 1870.)

(Also the original of the account, a copy of which is Exhibit "A," to the deposition of George P. Ihrie, herein.)

(Here an adjournment is taken until to-morrow, 3d instant, at 11 o'clock a. m.)

WEDNESDAY, *January* 3, 1877.

Present: Messrs. Wilson and Hayes, of counsel for complainant; Messrs. Garber and Botts, of counsel for defendants.

469 Cross-examination of R. H. SINTON resumed:

Q. 401. Mr. BOTTS: In the conversation in which you say this agreement originated between you and Mr. Irvine, did you agree, you and Mr. Irvine, that upon compensation being made to him for the services that he had rendered he would convey this title to you?

A. Not in terms.

Q. 402. In what terms was it so agreed?

A. Precisely as similar things are agreed between any two men, one desiring the other to obtain a tax title for him. It is done here every day, Judge Botts, in this town, every year, I mean; and not only here, but it is done all over the State.

Q. 403. I repeat the question. In what terms was such agreement made?

470 A. I repeat the answer. In the implication of terms, that the property should be conveyed to me, or should be subject to my disposition whenever I demanded. There was no such thing as that said between us; but it was inference altogether, and precisely as such things are always conducted between two gentlemen.

Q. 404. There were no words to that effect that passed between you?

A. No, sir; never are in any such cases.

Q. 405. Will you state, as nearly as you can, the precise language that was used by you and Mr. Irvine on that occasion?

A. I could not state that Mr. Irvine used any language at all; I stated the situation, and what I wanted done.

Q. 406. What did you say; what language did you use?

471 A. Well, I could not give you the words; but the substance of the words was that I desired him to obtain a tax title; that title, pointing it out to him. I pointed out the property, and told him that I wanted the tax title, and that he had recommended it to me by Mr. Gatewood as a gentleman who could do that service.

Q. 407. You told him that?

A. I have not the slightest doubt——

Q. 408. (Interrupting.) You recollect telling him that?

A. I do not recollect telling him that, but I have no doubt that I told him words to that effect, or to that import.

Q. 409. To which, you say, he made no response?

472 A. He accepted the trust.

Q. 410. How did he accept the trust?

A. By assenting to perform the service.

Q. 411. What did he say that authorizes you to say that he accepted the trust?

A. Simply his agreeing to do so, and doing it afterwards.

Q. 412. What did he say; what language did he use?

A. I could not tell you his words.

Q. 413. The substance of it?

A. Merely an acceptation, expressing an assent that he would perform it.

Q. 414. Did he say, "I accept this trust?"

473 A. I could not tell you whether he did or not, in those words.

Q. 415. Do you not know that he did not use those words?

A. No; I don't know that he did not, either.

Q. 416. Did you not just now state that Mr. Irvine said nothing?

A. My presumption is that he said nothing about it at all; there was no necessity for his saying anything; it was one of those cases probably where "silence gives consent."

Q. 417. Did you not studiously avoid the making of any arrangement by which Mr. Irvine, purchasing this title, would be under an obligation to convey it to you?

A. No; I never did any such thing.

Q. 418. Sir?

474 A. No, sir.

Q. 419. What did you mean, then, when you said that you took care to have the transaction in such a form that it would stand the closest judicial investigation?

A. I meant just exactly what I said, that we took every step that we could to have it stand in such a way that it should stand any investigation by which it might be tested.

Q. 420. Did you not state that you knew and understood that it could not stand judicial investigation, if there was any agreement by which Mr. Irvine was under an obligation to convey that title when he purchased it——

A. (Interrupting.) To Fair and Selover, yes; but not to

475 me, or upon my order, to any other party.

Q. 421. Then the plan was that the title was to be conveyed to you?

A. It was to be subject to my call—wherever I chose to put it.

Q. 422. And you say that it was understood that if the title came to you, you were to convey it to Mr. Fair and Mr. Selover?

A. Well, I intended to do that. There was no understanding between Mr. Selover and Mr. Fair and myself on that subject, either.

Q. 423. There was no understanding, then, between Mr. Fair and Mr. Selover and yourself that the tax title was to be obtained for them—for Mr. Fair or Mr. Selover?

A. The understanding between Mr. Fair and myself, when we

agreed to this proposition, or decided to pursue this scheme
476 of obtaining the tax title, was that it should be for the benefit of Mr. Fair and Mr. Selover.

Q. 424. Then you had agreed, if you obtained the title, to convey it to Mr. Selover and Mr. Fair?

A. Well, that was by implication again; that is all you can make of it.

Q. 425. There was an implication to that effect?

A. There is an implication in all such matters and nothing else.

Q. 426. You and Mr. Fair co-operated in this matter?

A. Mr. Fair furnished the money and I did the work.

Q. 427. The scheme or plan that you had talked about was arranged between you and Mr. Fair?

A. Yes, sir.

477 Q. 428. And the object of that plan was to obtain a tax title for Mr. Fair?

A. The object of the plan was to obtain a tax title, which would be a legal title against that which we deemed to be an unjust claim set up after an abandonment of sixteen years, set up by the old claimants of the property; that was the whole object.

Q. 429. You say now "That was the plan by which *we* were to obtain a title?"

A. I represented Mr. Selover; when I say "we" I mean Fair and Selover; there is no ambiguity about that.

Q. 430. The arrangement between you and Mr. Fair was that the tax title should be obtained for Mr. Fair and Mr. Selover, was it?

478 A. You may put it in that shape if you please, because, if it had come into my hands, I would undoubtedly have——

Q. 431. (Interrupting.) I ask you if that was the original agreement?

A. There was no agreement at all, because it was a plan; that word "agreement" don't suit, I take it.

Q. 432. Was it, then, the plan that the tax title being obtained, the property should be conveyed to Mr. Fair and Mr. Selover?

A. There was no statement to that effect made by anybody.

Q. 433. Was that the plan?

A. That was the idea.

Q. 434. Was that the plan?

479 A. That was the idea; there was no plan about it, so far as that was concerned; but that would have been the result.

Q. 435. Was there any plan?

A. The plan was, as I stated to you just now, that we would obtain a legal title, if it were possible to do so, to be used against that which we considered an unjust and inequitable claim by the parties who had abandoned the property for sixteen years, and never had expended a dollar on it or given it any attention whatever while we, that is, Fair and Selover again, had expended twenty-five thousand dollars and upwards in opening up the property, and some five or

six thousand dollars in dispossessing these Italians, Stevenot, and Baccigaloupi, who were in possession of the property, and came within six hours of acquiring the whole title to the property by prescription.

480 Q. 436. Mr. Sinton, there was an arrangement made between you and Mr. Fair, was there not, for the procurement of the tax title for Mr. Fair?

A. Yes, sir; I told you that several times.

Q. 437. The object of the arrangement or plan was to obtain the tax title for Mr. Fair, and not for you?

A. It was to obtain a tax title for the purpose—for the benefit of the property of Mr. Fair and Mr. Selover, and to off-set what I have just stated we conceived to be an unjust and unequitable demand.

Q. 438. But the object of the whole arrangement was to procure a tax title for Mr. Fair and Mr. Selover, was it not?

A. You may put it in that shape if you please.

481 Q. 439. I ask you the fact, sir.

A. There were no words ever uttered between Mr. Fair and myself to the effect that we were to obtain this tax title for our mutual benefit.

Q. 440. Will you state what passed between you and Mr. Fair in relation to that matter?

A. Simply that we would obtain a legal title to off-set——

Q. 441. (Interrupting.) Whom do you mean by "we?"

A. I told you several times—Mr. Selover and Mr. Fair.

Q. 442. But what passed between you and Mr. Fair in relation to it?

A. Now I will use the word "we" as denoting Mr. Fair and myself; I could not go into the matter of the exact language

482 used on an occasion ten or fifteen years ago.

Q. 443. Will you give your best recollection of what was said?

A. Nothing more in the world than the fact that we agreed that we would obtain this tax title if we could.

Q. 444. State what you said in substance, and what Mr. Fair said in substance.

A. I could not say anything more about it than that it was agreed between Mr. Fair and myself that we should obtain, if possible, a tax title to the property after this suit by Addison and others had been instituted.

Q. 445. By "we" you mean Selover and Fair?

A. Yes, sir; it was to be for their ultimate benefit.

483 Q. 446. You state that after Mr. Irvine had obtained this tax title, Mr. Fair denied his right of entry and that he was expelled by a writ of assistance?

A. Yes, sir, by a writ of assistance from the district court.

Q. 447. Did you ever pay Mr. Irvine any money before that time?

A. Before the writ of assistance?

Q. 448. Yes, sir.

A. I paid him that $105.19 in January before that—immediately after the purchase; it was in March, I believe, that the money was actually paid him.

Q. 449. March of what year?

A. March of 1870, I think it was; it was immediately after
484 the tax sale—immediately after we found out the amount paid and the amount of Mr. T. K. Wilson's fee, and then, according to one of my letters, when this messenger was sent up there to take possessien, on that day I advanced Mr. Irvine fifty dollars out of my own pocket.

Q. 450. Do you know when that was, sir?

A. I think I have got a letter which will show.

Q. 451. Do you not know that in 1869 Mr. Fair instituted an action in ejectment against Mr. Irvine?

Q. 452. When was it?

A. That was an agreed case that was made up to have the tax title confirmed; it could not have been in 1869; it must have been 1870; it was an agreed case, made up in order to have the confirmation of the tax title made final by the Supreme Court.

485 Q. 453. I ask you if you knew that he instituted an action against Mr. Irvine for that property?

A. Yes, sir.

Q. 454. How do you know it was an agreed case—that action in ejectment?

A. I was privy to the whole matter; Henry P. Barker was our counsel; that is, Fair and Selover's; H. P. Barber was counsel for Mr. Fair, and T. K. Wilson for Mr. Irivne; the papers setting forth the facts were prepared, and suit brought in the fourth district court, and judgment was taken in due time; bills of exception; I believe that was the order in which it was followed up—were made out, and then it went to the Supreme Court, and was decided from
486 the bench; the decision of the Supreme Court sustaining the judgment of the court below, sustaining the tax title.

Q. 455. I ask you how you know that this was an agreed case?

A. You asked me if I did not know that Mr. Fair commenced an action in ejectment; I know he did, but whether an action in ejectment or not, or to set aside that tax title, I could not say; but at all events, it was brought with a view of having the tax title confirmed; I know the fact that it was agreed between us; I read all the papers, and was in constant communication with Mr. Barber.

Q. 456. Does it appear from the face of the papers that it was an agreed case?

A. I do not suppose it does; I don't know; I never read the papers with the advice of counsel to see if there was any-
487 thing to show that such was the fact.

Q. 457. Then, if you did not know it from the face of the paper, how did you know that it was an arranged matter?

A. Because I arranged with Mr. Barber. Mr. Fair being absent in Virginia City; I representing Mr. Selover and Mr. Fair; it was discussed between Mr. Barber and myself.

Q. 458. You only know it from what Mr. Barber told you?

A. Yes; because Mr. Wilson, counsel for Mr. Irvine, consulted with Mr. Barber.

Q. 459. You know nothing about that except from statements made by Mr. Barber to you?

A. Yes, sir; because it was understood between myself and Mr. Barber and Mr. Fair, that such should be the case; that
488 there would be no technical objections made, but, on the contrary, every facility would be afforded; in order that the Supreme Court might pass upon and confirm this tax title.

Q. 460. Do you know that, then, by any other mode than by the statements made to you by Mr. Barber, Mr. Fair, and Mr. Selover?

A. Mr. Selover made no statement about it; I was the party who conducted the whole thing, and directed that it should be done that way.

Q. 461. Did you direct Mr. T. K. Wilson?

A. No, sir; I directed Mr. Barber.

Q. 462. Then all you know about the matter arises from what passed between you and Mr. Barber and Mr. Fair?

489 A. Yes, sir; and I directed the whole proceeding, how it should be done?

Q. 463. Directed whom?

A. Mr. Barber.

Q. 464. You say you paid Mr. Irvine on account of Mr. Fair, and with Mr. Fair's money, the sum of four hundred dollars?

A. That appears by the memorandum that Mr. Irvine furnished to that date.

Q. 465. Is it a fact that you paid it?

A. I could not give items and dates; I didn't know that I gave him the four hundred dollars, except that I took Mr. Irvine's statement that up to that time he received four hundred dollars from me.

Q. 466. Do you know that you did pay him some money on account for Mr. Fair?

490 A. Yes, sir.

Q. 467. You believe the sum of four hundred dollars?

A. I take that *data* from that statement.

Q. 468. You believe four hundred dollars?

A. I do.

Q. 469. Was that money paid as a part of his compensation for his services, or for what?

A. No; that was paid to pay expenses, you know; because expenses would accrue, and we did not want him to advance his money for expenses in doing service for us; that was but a portion of the expenses that he had incurred: when he informed me

that so much money had been paid out, we would immediately refund it.

491 Q. 470. Why was it not all paid; there was an account for $910?

A. Mr. Fair found an objection to the amount of expenses running up so rapidly, and he declined at the time to pay; said that he would be in town; my recollection now is that was the excuse that he gave; that he would shortly be here himself, and he would attend to it; and that rather displeased me; I had done the best I could, and did not like the idea of his grumbling about a small matter like that, and did not deign to give him a reply; and what he did after that about it I do not know; the last money that I gave Mr. Irvine, up to this time, the 27th of February, 1871, was four hundred dollars; I never paid him any money after that; I did not like Mr. Fair's not responding immediately to my letter,

492 and remitting the balance due to Mr. Irvine; there was this balance for six months' services due this man for keeping the mine, which I thought right to be paid.

Q. 471. Now, Mr. Sinton, before that time, before those payments were made, had you not learned from Mr. Irvine that he would not convey this property to either you or Mr. Fair——

A. (Interrupting.) No; not by any means.

Q. 472. (Continuing.) Except for the sum of twenty thousand dollars?

A. No; that came up long afterwards.

Q. 473. Long after 1871?

A. Not long after 1871; whether it was during the year 1871 or not I do not know.

493 Q. 474. Long after March, 1871?

A. Long after February, 1871.

Q. 475. Did you not ask Mr. Irvine what compensation he would expect for the conveyance that you wanted from him?

A. No; that never came up between us until the matter began to assume—sometime after the tax title had been obtained—well, what time I cannot say, but I informed Mr. Irvine that it was for the ultimate benefit of Mr. Fair and Mr. Selover.

Q. 476. It never came up before when?

A. Well, I don't know whether it was six months or twelve months after his being put into the possession under this writ of assistance. But in relation to this twenty thousand dollar

494 business, that assumed its form at still a later period, in a visit that Mr. Fair and myself made to him at his place of business, in Front street; what time that was I cannot fix now, but it was still subsequent to the time that I informed him, for the first time, that it was for the ultimate benefit of Mr. Fair and Mr. Selover.

Q. 477. Fix that Front street visit as nearly as you can.

A. It was during—just before the arrival of Mr. Selover here, at the time of that blockade; was that 1872 or 1873? It was just pre-

ceding that, the advent of Mr. Selover; what year that was I forget; it was somewhere preceding that snow blockade.

Q. 478. Did you not state that in October, 1872, Mr. Irvine first notified Mr. Fair and Mr. Selover concerning an arrangement that had been previously made?

495 A. It was October, 1872 or 1873, I could not tell exactly; the paper is in existence, and it will speak for itself.

Q. 479. If it was in October, 1872, that this was written, it could not have been in 1873 that this arrangement was made, could it?

A. Which arrangement?

Q. 480. The arrangement for the transfer of the property from Mr. Irvine to Mr. Fair and Mr. Selover.

A. (Referring to a paper.) Here is a memorandum that I made at the time; I will read it, if you please.

Q. 481. I don't want your memorandum, but if you can refresh your memory by looking at the paper, you can do so.

496 A. I will read you precisely what I wrote at that time.

Q. 482. I do not want what you wrote at that time; if you have refreshed your memory in any way I want now your statement; I do not care how you refresh it; my question is, at what time was the arrangement made, or the negotiations, for the transfer of the property by Mr. Irvine to Mr. Fair and Mr. Selover, of which you have spoken when Colonel Barnes represented Mr. Fair, and Mr. Samuel M. Wilson represented Mr. Selover?

A. The negotiation took place at four different meetings, which were held on December 6, 1871, December 9th, 1871, Monday, December 11th, 1871, and December 15th, 1871. Here is a record of it, made right at the time; I found that memorandum yesterday afternoon when looking over my papers; it has been lying in my portfolio since it was made; it was made immediately after

497 these meetings on returning to my office.

Q. 483. Prior to that time there had been a negotiation which was broken off, had there not?

A. Yes, sir; Mr. Selover and Mr. Fair themselves were having negotiations with Mr. Irving during the time Mr. Selover was here.

Q. 484. Prior to that Mr. Fair himself——

A. Had visited Mr. Irvine.

Q. 485. Had visited Mr. Irvine upon that subject?

A. Yes, sir.

Q. 486. When was that, Mr. Sinton?

A. It was preceding this time—during October or November; Mr. Selover was here during all of October and part of November; he went from here just in time to get through that block-

498 ade, and prior to that Mr. Fair had visited Mr. Irvine at his place of business.

Q. 487. What time was it that you accompanied Mr. Fair to Mr. Irvine's place of business on Front street?

A. Well, it was during that summer time, sometime; what date or what time I do not know that I made any memorandum of, and

therefore I could not tell what day, or what day of the month, or what month it was.

Q. 488. Mr. GARBER: When was it, with reference to this time in December, when the negotiation was had with Colonel Barnes and Mr. Wilson?

A. Preceding that.

Q. 489. About how long?

499 A. About three months before that, probably.

Q. 490. Mr. BOTTS: Might it not have been twelve months before that?

A. No, sir; it could not have been twelve months before that.

Q. 491. Now, do you mean to say that the first inquiry you made, or they made to your knowledge, of Mr. Irvine's concerning the compensation for which he would make this conveyance, was as late as the summer of 1871?

A. No; I had communicated the fact to Mr. Irvine some time previous to that, simply myself, but I had no authority or had no means to make a settlement; I probably asked him what
500 amount he would expect, but after the whole thing had been accomplished and he was in possession of the premises, shortly after that, or some time after that, what length of time I do not recollect, I informed him then of the ultimate design of the whole affair.

Q. 492. It was a very important matter for your principals to understand upon what terms Mr. Irvine would convey this property to you or to your order, was it not?

A. Well, they hadn't any particularly great interest in the matter one way or the other.

Q. 493. They did not care what amount he required?

A. No, not that at all; but it was to be supposed that, as in all such cases, he would demand a reasonable compensation, which would have been paid.

501 Q. 494. There was no particular interest in ascertaining upon what terms he would convey it?

A. None, more than that which I had taken in it. But I presume from the character under which he had been introduced to me that whatever compensation he would ask at the proper time would be a reasonable one.

Q. 495. Was it not a matter of a good deal of interest what he would ask?

A. It was not pressing. The amount that he had paid out had been refunded, and everything seemed to be all right.

Q. 496. It was not, you say, until the summer of 1871, that any inquiry was made of him as to the terms upon which he would convey to these parties?

502 A. That is my impression; I do not say that it is so, absolutely, by any means. Understand now, that I do not undertake to fix, particularly, those dates, because I have no way to fix them in.

Q. 497. Then, when Mr. Irvine refused to convey for any less than twenty thousand dollars, did you demand that he pay this money back?

A. What money back?

Q. 498. The money that you had paid him.

A. No; there was nothing ever thought of that in the premises at all; there was nothing said about it in any way; this was a compensation for services, aside from the expenses that had been refunded to him.

503 Q. 499. This was compensation for services—this four hundred dollars?

A. No; I say this twenty thousand dollars that he demanded was a compensation for services, and he had nothing to do with the expenses.

Q. 500. Then he demanded that he should have not only twenty thousand dollars, but also the amount of the expenses that had been incurred?

A. That was a proposition that I had followed up from time to time; I told him "whenever you have expenses to pay, I will pay it to you immediately;" it was no demand on his part for expenses; but it was a matter that was understood from the very inception that these necessary expenses should be paid by us.

Q. 501. Than the twenty thousand dollars that he demanded was exclusive of any expenses that he had incurred?

504 A. Of any expenses that he incurred; yes, sir.

Q. 502. The original arrangement between you and Mr. Irvine, I think you said, took place in the presence of Mr. Jefferson Gatewood?

A. No; I did not: I said Jefferson Gatewood introduced us.

Q. 503. Did he do anything more than introduce you?

A. I do not recollect whether he did or not.

Q. 504. Did any conversation pass between you and Mr. Irvine, in his presence, in relation to this matter?

A. I do not recollect whether there did or not.

Q. 506. After introducing you to Mr. Irvine did he leave you?

A. I do not recollect that either.

505 Q. 507. You do not know whether he did or not?

A. I do not recollect, I say.

Q. 508. The statement that you last made, in reference to the negotiation, at which Colonel Barnes and Mr. Wilson were present, were made by reference to a memorandum that you made at the time of the negotiation?

A. Yes, and which I discovered yesterday in my portfolio.

Q. 509. That memorandum contains a true statement of what did occur there?

A. I guess it must, because it was made immediately afterward; immediately on my return to my office.

(The statement above referred to is offered in evidence by
506 defendant's counsel, and marked Exhibit No. 10.)

Q. 510. Will you look at the paper dated October 1st, 1872, which I now hand you, and tell me if that is the notification that you spoke of as having been given by Mr. Irvine to Mr. Fair and Mr. Selover?

A. Yes, sir; this was sent to me by Mr. Selover from New York; he stating in his enclosure that it had been sent him by Mr. Irvine.

Q. 511. That paper, which you now hold in your hand, is the notification to which you refer?

A. Yes, sir.

(Said paper is offered in evidence by defendant's counsel, and marked Exhibit No. 11.)

507 (It is admitted that the said Exhibit is all in the handwriting of Mr. Irvine, the defendant.)

(It is also agreed that a copy of said exhibit may be taken and annexed to this deposition, and taken as the original.)

Q. 512. With respect to the compromise that was made between Mr. Irvine on the one side, and Bacon, Addison, and others on the other side, of the date of April 14th, 1873, did you do anything except advise and talk with Mr. Irvine?

A. No.

Q. 513. That is all you did about it?

A. We had read the draft of the proposed compromise over together, and we would make corrections and additions, and alter and amend, and re-read, and all that sort of thing——

508 Q. 514. (Interrupting.) You had nothing to do with the negotiation of the compromise with any of the parties?

A. Not directly in person, but I advised with Mr. Irvine in the premises.

Q. 515. But in person, no?

A. Not in person, no, sir.

Q. 516. You said, I think, on your examination-in-chief, that when you conveyed to General Ihrie you did not know the meaning of the word "escrow"?

A. Not in its strict legal significance that I understand it does bear.

Q. 517. When did you come to understand what legal significance it bears?

A. Subsequent to the commencement of these proceedings.

509 Q. 518. How did you come to understand it then; who caused you to understand it; Mr. Wilson, was it not?

A. I believe Mr. Wilson told me what the strict significance of the terms were.

Q. 519. Did Mr. Wilson have the conveyance before him, or did he refer to the conveyance in that conversation with you?

A. I am not certain whether he was the one who told me or that there was any conveyance present.

Q. 520. He told you that it was rather an ugly word, did he not?

A. He told me that it was an unfortunate use of a word that I did not know the meaning of.

510 Q. 521. Somebody told you that you did not know the meaning of the word?

A. Yes, sir.

Q. 522. Was it not Mr. Wilson?

A. I could not say positively; I think it more than probable that it was Mr. Wilson.

Q. 523. Mr. Sinton, where were you born?

A. You know, Judge Botts, very well; I was born near Richmond, Virginia.

Q. 524. Where were you educated?

A. I was educated in the State of Virginia.

Q. 525. Whereabouts in the State of Virginia?

511 A. Do you want me to give you all the places?

Q. 526. You had a collegiate education, did you not?

A. Yes, sir; a pretty strong one; more of a scientific and natural education than classical.

Q. 527. Where did you get your collegiate education?

A. At the Military Academy of Virginia.

Q. 528. At Lexington?

A. Yes, sir.

Q. 529. That is a pretty thorough institution, is it not?

A. Yes, sir; it is not a classical school by any means, nor a legal or law school, or anything of that sort; the whole burden of the course taught was the natural sciences.

512 Q. 530. Young men get a pretty good English education there, [do] they not?

A. Yes, sir, very good.

Q. 531. You graduated at that University?

A. I did.

Q. 535. Graduated high, did you not?

A. Graduated at the head of my class.

Q. 533. In what year did you graduate?

A. 1847.

Q. 534. When did you come to California?

A. Three weeks after I graduated I was on my way to California. I graduated on the 4th of July, and three weeks after I was attached to the navy and on my way here.

513 Q. 535. You were attached to the United States Navy as purser's clerk, were you not?

A. Yes, sir.

Q. 536. Clerk for Mr. Forrest?

A. Yes, sir; when he got sick and kind of crazy, I was acting purser for the whole squadron.

Q. 537. When did you come ashore here?

A. On the 22d of December, 1848.

Q. 538. Did you go into business here?

A. I did.

Q. 539. What business did you go into?

A. General Naglee and myself established a banking and gold dust purchasing and selling office.

514 Q. 540. What business were you in subsequent to that?

A. Real estate principally, from that time to this.

Q. 541. What time did you commence the real estate business?

A. General Naglee and myself dissolved in July, 1849, and immediately I went into the real estate business in connection with an office that we had for the purchase and sale of gold dust.

Q. 542. With whom were you first associated in the real estate business?

A. Mr. David G. Bagley.

Q. 543. Mr. Bagley was a lawyer, was he not?

A. I believe he was a member of the bar in Virginia; I think I have heard he was; he was not practicing here.

515 Q. 544. How long were you associated in business with Mr. Bagley?

A. We commenced in July, 1849, and we were in business together about twelve months; I went home the first of June, 1850, and when I came back my business was all gone—destroyed by fire, and bad speculations, and one thing and another.

Q. 545. With whom did you next go into business?

A. Ned Byrne; we opened a money-broker business; I was associated next with Mr. Selover in the real estate business; some time in 1853, I think it was, that Mr. Selover and myself commenced the business of auctioneering and general dealing in real estate.

Q. 546. How long did you remain with Mr. Selover in business?

516 A. In some sense we have not separated since; we were actively engaged in business together until some time in 1855; he got into the Mariposa business and went East, and that separated us.

Q. 547. Are you still partners in business?

A. No; but we have never cleared or settled up all the old residues of the business.

Q. 548. But you are not conducting business together?

A. No, sir.

Q. 549. What business have you been engaged in since you and Mr. Selover dissolved?

A. General Cobb and I were engaged for a number of years in the real estate business; we succeeded the firm of Selover

517 & Sinton.

Q. 550. It was Sinton & Cobb then, was it not?

A. Cobb & Sinton.

Q. 551. How long were you in business with General Cobb?

A. Until the 17th or 18th of April, 1867, when we dissolved.

Q. 552. What did you next do; did you continue in the real estate business?

A. I proceeded to the Morgan mine to work it.

Q. 553. That has been your business, has it?

A. No; I say that was my next step.

Q. 554. How long were you engaged in working the Morgan mine?

518 A. The day that I went up to establish myself there, General Addison went upon the same boat, and he made an examination of the title and commenced proceedings, and in the course of a couple of weeks we shut the establishment up, on account of the bringing of this suit of Addison and others against Mr. Fair, Mr. Selover and myself.

Q. 555. How long did you say you were engaged in working the Morgan mine?

A. Well, I was not engaged in working it at all; I went from here for that purpose; that was one month after dissolving my business connection with General Cobb; I thought I could do better with it than I could in real estate; I never worked there at all, or took up my abode there. I made another trip up there

519 and closed up the indebtedness and closed the mine up.

Q. 556. What did you do next?

A. I came back here and went into the real estate business.

Q. 557. Alone?

A. No; I commenced business here with Lucien Herman, real estate and money business.

Q. 558. How long were you engaged with Mr. Herman in the real estate business?

A. About a year, I think.

Q. 559. And then?

A. And then I took the real estate business to myself, and he took to mining secretaryships.

Q. 560. Are you still in the real estate business?

520 A. At present I am called to the license collectorship of San Francisco.

Q. 561. You received a call, did you?

A. Yes, sir; I did not seek the position, it was unanimously tendered to me by the board of supervisors of the city of San Francisco.

Q. 562. How long did you continue in the real estate business alone, after you left Mr. Herman?

A. I am really in the real estate business also, because the amount of pay that I receive from the license office would not pay my expenses.

Q. 563. Is it not true that both yourself and Mr. Selover, and yourself and General Cobb, and you and Herman, and yourself alone have always done a very large business in buying and sell-

521 ing real estate?

A. Very large, yes, sir.

Q. 564. Particularly the firm of Selover & Sinton and Cobb & Sinton, is not that so?

A. Yes, sir.

Q. 565. I suppose Selover & Sinton and Cobb & Sinton did as large a business as agents for buying and selling real estate as anybody in the city?

A. Larger, I suppose, than any one else.

Q. 566. Is it not true that, acting as the agent for purchasers and sellers of real estate, you have found that the examination of titles in California always intervenes before the purchase or sale is made?

A. O, yes; that would be the case with any prudent per-
522 son, but is not always the case; I have known some transactions to be made without an examination of the title, but as a rule, a careful buyer would search the title.

Q. 567. I suppose a seller, a man who employs an agent to his estate, is expected always, if the agent finds a purchaser, to submit his title to examination?

A. Yes, sir.

Q. 568. You were, then, very much in the habit of examining titles, were you not?

A. No; never did.

Q. 569. I do not mean as a lawyer, or to pronounce upon it, but a great many titles came under your inspection?

A. No; it was one of the first rules that we established,
523 that between ourselves we would never examine titles.

Q. 570. Did you have any lawyer for examining titles?

A. No, sir; the lawyer who examined the titles was always selected by the purchaser himself; we never touched them.

Q. 571. You say you have learned considerable of the law concerning tax titles; have you not also learned something of the law relating to titles generally?

A. I have something of the general knowledge of a business man on the subject—I think a pretty good one.

Q. 572. Did it not happen frequently that when a lawyer made some objection to the title of a party for whom you were endeavoring to sell property, you would go to him and ascertain what the difficulty was?

524 A. O, yes.

Q. 573. You had frequent interviews with lawyers with respect to titles.

A. Yes, sir, numbers of times—great numbers of times.

(Here a recess is taken until 2 p. m.)

Afternoon Session.

Present: Messrs. Wilson and Hayes, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendants.

525 Cross-examination of R. H. SINTON resumed:

Q. 574. Mr. BOTTS: Mr. Sinton, did you ever pay one dollar of money to Mr. Irvine on your own account, in connection with the Morgan mine?

A. So far as he knew it was on my own account, yes.

Q. 575. Did you ever pay to Mr. Irvine any other moneys than those you have already deposed to?

A. The four hundred dollars—no; that is in connection with this business; I believe I bought some groceries of him once.

Q. 576. Did you ever pay him a dollar of your own money on any account?

526 A. Yes; I think I did.

Q. 577. What was it for?

A. Well, I bought some family groceries from him, on which I owe him a balance, probably, at this day.

Q. 578. Did you ever pay him a dollar for family groceries?

A. I think so; that is my recollection; I think I owe him a balance to-day.

Q. 579. And that is all the money you ever paid him at all; that which you paid for family groceries?

A. No, sir; I paid him this four hundred dollars.

Q. 580. Of your own money?

A. No, sir.

527 Q. 581. You never paid him a dollar of your own money, except for family groceries?

A. No, sir; the money that I paid him on account of the Morgan mine was refunded to me by James G. Fair.

Q. 582. Furnished to you by Mr. Fair?

A. In that sense it would be; I advanced him fifty dollars at one time, and rendered an account of it to Mr. Fair, and he sent me the money back.

Q. 583. You made one advance for Mr. Fair?

A. Yes, sir.

Q. 584. But on your own account you never paid him a dollar, except for family groceries; is that so, sir?

528 A. That is it; that is my impression that I paid him something on account of a little bill for family groceries.

Q. 585. And you never did pay him the whole of your bill for family groceries?

A. There is a small amount of balance due.

Q. 586. When did you make that bill of family groceries with Mr. Irvine?

A. I could not tell you now.

Q. 587. What year?

A. Probably 1871 or 1872; I don't know which; or maybe 1870, whatever it is. It answers for itself. He can answer that question better than I can.

Q. 588. Did you ever buy but one bill of groceries from him?

529 A. That I could not tell you; probably two bills; might have been three bills. I do not know.

Q. 589. You spoke of your insolvency. When did you become insolvent?

A. I think I bursted—I think I broke entirely down immediately after the great rise in stocks in May, 1872.

Q. 590. Did you ever know a man by the name of Edward W. Murphy?

A. No; never saw the man in my life—Edward W. Murphy?

Q. 591. Edward A. or Edward N.; Edward Murphy.

A. There may be several Edward Murphys. I don't know whom you refer to, particularly.

Q. 592. Did Edward Murphy obtain a judgment against you in the justices' court of San Francisco in October, 1871, for the sum of $246.65?

530 Obj. (Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial, and on the ground that it is not the best evidence of the rendition of the judgment, which would be the record itself, no foundation having been laid for the introduction of secondary evidence of it; and further, that it is not based upon any part of the examination-in-chief.)

A. A man by the name of Murphy has a judgment against me.

Q. 593. A man by the name of Murphy did obtain judgment against you?

A. A fellow who lives in Stockton street, near Green. I will identify him that way. I don't even know what the man's name is.

531 Q. 594. On proceedings subsequent to execution in that case did you swear that you had no property?

A. I did.

Q. 595. Were you insolvent then?

A. I was, clean.

Q. 596. Then you were insolvent before 1872, were you not?

A. Yes, sir.

Q. 597. You are mistaken, then, in saying that——

A. (Interrupting.) No, I am not mistaken, because there are a great many ups and downs in a year in a man's life in San Francisco.

Q. 598. You did not for the first time become insolvent in 1872?

532 A. You did not ask me any such question as that; I have been insolvent in San Francisco several times since I have been here, and paid up all my debts afterwards, and interest besides; I am wagging now under the insolvency of 1872, at which time the great break came—the complete mash.

Q. 599. When did you first become insolvent?

A. I don't know; a great many years ago.

Q. 600. Before 1871?

A. Oh, a great many years ago, and several times.

Q. 601. Before 1872?

A. Yes, sir.

Q. 602. And you paid up all your debts?

533 A. I did.

Q. 603. Did you ever pay that debt to Murphy?

A. No, sir.

Q. 604. Then you have not paid all your debts?

A. During the former years of my life I became insolvent several times, and afterwards paid all my debts.

Obj. Mr. WILSON: All this evidence in relation to the insolvency of the witness, as well as that relating to the alleged indebtedness to Murphy, is objected to, as incompetent, irrelevant, and immaterial, and, further, upon the ground that it is not based on anything called out in the examination-in-chief.

534 Q. 605. Mr. BOTTS: About this insolvency of 1871——

A. (Interrupting.) That was not connected with my insolvency, but was not paid because I did not choose to pay the debt at the time; when he put me on the second examination they had cleaned me out of everything.

Q. 606. You were insolvent in 1871, in October?

(The same objection.)

A. I presume so, if that was the date and the time.

Q. 607. That debt you never paid?

A. That debt I never paid; he renewed the judgment the other day.

Q. 608. Have you been solvent since 1871?

(The same objection.)

535 A. I have owned a great deal of money since 1871.

Q. 609. Have you been solvent since 1871?

Obj. (The same objection.)

A. I have owned a great deal of money since 1871.

Q. 610. I ask you the question again.

A. I repeat the answer again.

Q. 611. Have you been solvent since 1871?

(The same objection.)

A. I repeat the answer. I have owned a great deal of money since 1871.

Q. 612. You refuse to give any other answer than the one you have just given?

536 A. I will answer any proper question you will put.

Q. 611. (Repeated.)

A. I will give you an answer to any proper question you may put touching this case.

Q. 613. Then I will ask you the question again. Have you been solvent since 1871?

(The same objection.)

A. I have owned a great deal of money since 1871.

Q. 614. And you refuse to give any other answer to that question?

A. I will give you a proper answer to any proper question you will put touching this case.

Q. 615. Are you lawyer enough to determine what ques-
537 tion or questions are proper?

A. I have sense enough as a man to determine my own ideas of what is propriety and what you should ask.

Q. 614. Do you refuse to give any other answer to that question?

A. I will answer it when you put the proper question, unless my counsel shall instruct me not to do so.

Q. 615. Who is your counsel?

A. In this case, he is Mr. Wilson, I appearing as the attorney-in-fact of Mr. Dunham.

Q. 616. Have you had any conversation with your counsel upon the subject of the testimony that you have given here, or that you should give in this case?

A. No, sir; I have given the subject my own thought as I
538 have pleased to put it, and as I will continue to do.

Q. 617. Then you have not consulted your counsel?

A. I have consulted the counsel in this case freely in all matters pertaining to it.

Q. 618. Then, I asked you the question and I will ask it again. Did you, on proceedings subsequent to execution in the case of Murphy *vs.* Richard H. Sinton, in the justices' court of the city and county of San Francisco, before Charles Corkery, a justice of the peace, on or about November 24th, 1871, swear that you had no property of any sort or kind?

Obj. (The same objection.)

A. At that time I had none.

Q. 619. Did you so swear?

539 Obj. (The same objection.)

Q. 619. Did you so swear?

Obj. (The same objection.)

A. I did.

Q. 620. Was that true?

(The same objection.)

A. That was true, whenever that examination was; I presume the record of the justices' court would show the correct date.

Q. 621. Did you so swear in December, 1871?

(The same objection.)

A. Now you are putting different dates again; I never did so swear but once.

540 Q. 622. But you did so swear once in that case.

(The same objection.)

A. Yes, sir, and when I did so I swore to the fact as it existed.

Q. 623. You were then insolvent?

(The same objection.)

A. I was then utterly and absolutely.

Q. 624. When after that did you become solvent?

(The same objection.)

A. That I do not know.

Q. 625. Did you ever become solvent after that?

(The same objection.)

541 A. That is the same question. I told you before I have owned a great [deal] of money since that. Whether I was solvent and could pay all my debts, I do not know. I never bothered myself about that. I was playing for a big stake, and lost most heavily instead of winning.

Q. 626. Will you swear that you were ever solvent from 1871 up to this time?

(The same objection.)

A. Well, I don't think I would, because I never took the pains to inquire. As I told you, I was playing for a big stake, and I lost instead of winning. I had at one time a vast amount of money; a large amount; a very large amount.

Q. 627. Mr. HAYES: Since 1871?

542 A. Yes, sir; since 1871. But I did not propose to bother anybody about my business, and I made speculations which were heavy.

Q. 628. Mr. BOTTS: The complaint in the case of Dunham *vs.* Irvine—this case—was verified by you, Mr. Sinton, was it not?

A. I believe it was.

Q. 629. Do you not know whether it was or not, sir.

A. If my signature is there, it was.

Q. 630. Do you not know whether you verified that complaint or not?

A. My impression is I did.

Q. 631. Do you not know that you did?

A. If my signature is there I did.

543 Q. 632. Do you not know that you did?

A. I could not say positively and particularly anything that you said or did, or that I said or did yesterday at twelve o'clock.

Q. 633. You do not know whether or not you verified that complaint?

A. I think it probable I did.

Q. 634. You do not know whether you did or not?

A. The complaint will speak for itself.

Q. 635. You do not know whether you verified it or not?

A. The complaint will speak for itself; the papers will speak for themselves.

544 Q. 636. I ask you the question: Do you not know whether or not you verified that complaint?

A. If you will let me look at the complaint, I will tell you whether I did or not: if any paper is shown me that I have signed my name to, I will answer such a question categorically.

Q. 637. Do you know whether you verified that complaint or not?

A. If you will hand me that complaint or send it to me, and I find that my name is signed to it, I will tell you so.

Q. 638. I repeat the question.

A. I repeat the answer.

Q. 639. And you refuse to give any other answer to that question?

545 A. I repeat the answer, sir.

Q. 640. You refuse to give any other answer?

A. I repeat the answer; you send me the complaint, or whatever it is, and if my signature is there I will answer it; I do not recollect whether I verified the complaint or not; you asked me the question: "Don't you know the fact whether you did do that exact thing or not?" If you had asked the question after showing me the complaint, I would have answered it long ago; I do not want to get into any personalities here, but at the same time I know my rights as a man, and will assert them, wheresoever I am; I like to have the matter sifted to the bottom, but at the same time I understand my rights.

546 Q. 641. In the complaint in this case of Sumner T. Dunham *vs.* William Irvine and the Morgan Mining Company it is alleged: "That said interest in said mining property had been and was acquired by said Irvine and Sinton, by their mutual efforts, and at their mutual expense, and for their common and equal benefit, and by, upon, and pursuant to an agreement between them to acquire the title thereto, and to sell or otherwise dispose of the same, and to equally share the profits and losses arising thereupon;" is that allegation true?

A. It was drawn by counsel, Mr. Wilson; I presume it is.

Q. 642. Was that property, the Morgan mine, acquired by you and Mr. Irvine at your mutual expense?

A. No, sir; not at the expense of either of us.

547 Q. 463. Then that allegation is not true?

A. The allegation is true.

Q. 644. How can an allegation that it was acquired at the mutual expense of yourself and Mr. Irvine be true, if it was not acquired at the mutual expense of yourself and Mr. Irvine?

A. I suppose upon the proposition, generally, that a new order of things turned up; naturally enough, under this new order of things, when the notification was given by Mr. Irvine to Mr. Fair and Mr. Selover, as I had the verbal promise of Mr. Selover that

when the thing was finally settled, he would give me one-half of whatever interest or profit he should derive from the property; Mr. Irvine agreed that he would do the same thing, and account
548 to me for one-half of whatever he would get out of the profits; that is the plain explanation of the whole affair.

Q. 645. This mine was not acquired by you and Mr. Irvine at your mutual expense, was it?

A. It was acquired at the expense of James G. Fair; he paid all the money.

Q. 646. You paid no money towards its acquisition at all?

A. No, sir; not a dollar out of my own pocket; I have told you that several times.

Q. 647. Now, when Mr. Dunham stated that it was acquired at your mutual expense, that is a mistake?

A. No mistake about the matter at all; expense—the expense of labor, expense of time—there is expense of all kinds; it was
549 under the advice of my counsel that that was sworn to, and that is the form in which he drew the complaint; I am representing Mr. Dunham as his attorney-in-fact.

Q. 648. You swore, did you not, that that allegation was true?

A. Yes, if it is on that original complaint.

(It is agreed that so far as this examination is concerned the copy of the complaint on file in this case shall be treated as the original, which was verified by the witness.)

Q. 649. Will you look at this verification appended to the complaint of Mr. Dunham in this case and say whether or not that is a a copy of the original signed by you and sworn to by you? (Gives.)

550 A. I presume it is, but I could not say it is. I do not know whether this is a true copy or not. I presume it is, though. I could not say that this is a true copy of a paper that has been out of my hands for two years. I believe that it is the verification that I signed, but I would not swear that it is the thing, unless I had the original here.

Q. 650. Do you now recollect the fact that you verified the complaint?

A. It is probable I did; I think so. Mr. Wilson says I did verify the complaint, and probably I did.

Q. 651. Were you the attorney-in-fact of Mr. Dunham in and about this matter of bringing this suit?

A. I was.

Q. 652. Did you employ Mr. Wilson to bring this suit for Mr. Dunham?

551 A. Mr. Selover employed him.

Q. 653. Did Mr. Dunham verify the complaint?

A. Mr. Dunham is not in the country.

Q. 654. Where does Mr. Dunham live?

A. In New York city.

Q. 655. Did Mr. Dunham verify this complaint in New York?

A. No; he did not.

Q. 656. The complaint was verified?

A. I presume it was; yes.

Q. 657. You do not know whether it was or not?

A. If I could see the original, with my name on it, I could tell you. The proposition is simply nothing else in the world
552 but this. If I see my signature to a paper, I can tell you the fact whether or not I did it.

Q. 658. But you do not recollect that you did verify it?

A. The probabilities are that I did do it; but if I should answer that I did do it, and it should appear from the original that I did not sign it, it would be awkward, wouldn't it?

Q. 659. You do not absolutely recollect doing it?

A. I do not absolutely recollect verifying a complaint for anybody.

Q. 660. How is it that, you being the attorney-in-fact of Mr. Dunham for this purpose, Mr. Selover employed Mr. Wilson and not you?

553 A. Well, I cannot tell you how it came about, as a fact.

Q. 661. Have you got that power of attorney from Mr. Dunham?

A. Yes; I now produce the original paper, handed me by Mr. Wilson.

Q. 662. Did you act under this power of attorney in bringing this suit?

A. Whatever act I committed I did under that authority, of course.

Q. 663. Did you commit any act in and about the bringing of this suit?

A. Any act that I did was done under that authority; I suppose I verified the original papers; I am willing to go and examine the original complaint and then testify positively whether or
554 not I verified it; that is about the only act that I did, except to furnish Mr. Wilson with the necessary information concerning the suit.

Q. 664. Did you do anything about the instituting of this suit for Mr. Dunham?

A. In furnishing Mr. Wilson with all the *data*, all the facts, all the information that I could bring out that I could recollect, or that I conceived touched the case, in order to enable him to draw an intelligible cemplaint—or his complaint, at least.

Q. 665. Did you take any part in the institution of this suit?

A. I took all that part in it; yes, sir.

Q. 666. Is that all the part you took?

A. That is about all that could be taken.

555 Q. 667. You took all the part that could be taken?

A. That is about all that I could take.

Q. 668. Have you any interest in the result of this suit?

A. Do you mean pecuniary interest?

Q. 669. Yes.

A. I answered that before; my interest in the thing has gone up.

Q. 670. Are you acquinted with Mr. Dunham, the plaintiff in this suit?

A. Personally?

Q. 671. Yes, sir.

A. Yes, sir.

556 Q. 672. Where did you know him?

A. I knew him in California; he was my guest for quite a time.

Q. 673. What time was that?

A. I think it was 1871; 1870 or 1871.

Q. 674. Did Mr. Dunham then reside in California?

A. He was on a visit here.

Q. 675. What is Mr. Dunham's business?

A. He is a member of the Big Board, as we call it here, in New York city.

Q. 676. A stockbroker?

A. Yes, sir; a man of very considerable means, and doing a very large business.

557 Q. 677. You said, I think, sir, that when you made this conveyance of your interest in the Morgan mine to General Ihrie, you were indebted to him?

A. I was.

Q. 678. And that the conveyance was made by way of security for the payment of that indebtedness?

A. It was.

Q. 679. Did General Ihrie hold any note of yours?

A. Yes.

Q. 680. What was the character of that note—the amount?

A. The character of that note was—I forget the date of it; some time back; the amount was $3,115, and interest accrued at the time the thing was made, and then some odds and ends of

558 moneys passed between us at the time, that I owed him outside of it; the whole thing amounting then to five thousand, and I do not recollect; I think the amount is expressed in that conveyance that Mr. Wilson has.

Q. 681. Was that a promissory note?

A. Yes, sir; on demand.

Q. 682. Payable on demand?

A. Yes, sir.

Q. 683. To what amount of money?

A. $3,115; I forget the exact date of it; if it is desirable I can refer to my memoranda and find it.

Q. 684. I would like to know; was it a note bearing interest?

A. A note bearing interest.

Q. 685. At what rate of interest?

559 A. I think it was one and a quarter per cent. I think the

note is dated the 1st of January, 1873. I think that is it. And then there were some other matters, as I told you, outside of that—moneys loaned, and little balances of stock operations, and such things.

Q. 686. That note was dated in 1874, was it not?

A. No, 1873, I think. I can go and get a copy of the note, exactly.

Q. 687. Who holds that note now, Mr. Sinton?

A. Whether he surrendered it to Mr. Dunham or holds me responsible for it, I don't know; but he has got a guarantee from Mr. Dunham.

Q. 688. How do you know that?

560 A. Of that I was informed by Mr. Selover when he was here last.

Q. 689. Have you read General Ihrie's deposition in this case?

A. I have not; I have not looked at it; I have not seen it—the first word of it.

Q. 690. That note has never been surrendered to you, Mr. Sinton?

A. No, sir; it has not.

Q. 691. Do you know the consideration for which General Ihrie made this conveyance to Mr. Dunham?

A. They guaranteed me against the payment of that note.

Q. 692. Who guaranteed you?

A. Mr. Dunham.

Q. 693. Have you got that guarantee?

561 A. No, I have not. It is a matter that I have no doubt about. Mr. Selover communicates to me that that is the fact, and so does General Ihrie.

Q. 694. Who communicated it to you?

A. General Ihrie and Mr. Dunham and Mr. Selover, all three of them.

Q. 695. Was the guarantee furnished verbally or by letter?

A. It was a mere statement coming to me, so far as that is concerned. General Ihrie holds the guarantee. They never gave me the guarantee at all, but they guaranteed General Ihrie to pay that indebtedness to him.

Q. 696. Who did?

562 A. Mr. Dunham, and Mr. Selover endorsed it, or sub-guaranteed it, I suppose you may term it. That is the information that I get on the subject.

Q. 697. From whom did you get that information; did you get that information from General Ihrie?

A. I got that information from General Ihrie, I got the information from Mr. Dunham, and I got it from Mr. Selover; all three of them.

Q. 698. Did you get that information by letter?

A. Yes, from General Ihrie and from Mr. Dunham.

Q. 699. Have you got those letters?

A. I may have them; I don't know whether I have or not.

Q. 700. You do not know whether you have those letters or not?

563 A. I cannot say now; I will overhaul my letters and see; I think I have got them.

Q. 701. But you do not know whether you have preserved that information or not?

A. I don't know whether I have them or not; if I have I will give them to you.

Q. 702. But you do not know whether you preserved them or not?

A. I do not know now whether I have them or not.

Q. 703. When did you see them last?

A. It was a great many months ago, about the time of the transaction of General Ihrie with Mr. Dunhan; in the course of a month from the time of the transaction between General Ihrie and Mr. Dunham.

564 Q. 704. And you got a letter from General Ihrie and another from Mr. Dunham, stating that Mr. Dunham had guaranteed General Ihrie——

A. (Interrupting.) He had transferred the property to Mr. Dunham, and Mr. Dunham and Mr. Selover had guaranteed the payment of this note of mine.

Q. 705. That they had guaranteed the payment?

A. They would hold me harmless in the premises at all events.

Q. 706. Those letters will you produce?

A. If I have them I will most undoubtedly give them to you; it is of no earthly object to me or anybody else; it is a fact as it occurred.

Q. 707. The guarantee is that——

565 A. That Mr. Dunham will pay General Ihrie, and that necessarily releases me.

Q. 708. That is only your inference, then, that it releases you?

A. Well, a good many old unsettled matters between Mr. Selover and myself have been transferred to Mr. Dunham; and if it ever comes to a settlement and I am ever in a position to respond, I will see that thing shall be credited.

Q. 709. You had a correspondence, then, with General Ihrie and Mr. Dunham, concerning this conveyance made by General Ihrie to Mr. Dunham, did you not?

A. The correspondence was subsequent to the fact; the statement was as I have just detailed it to you; they were to hold

566 me harmless in the premises.

Q. 710. Was that statement made in a letter?

A. Yes, sir; that they were to hold me harmless in the premises, and to assume that note, I consenting to this transfer.

Q. 711. But I thought you said this correspondence was subsequent to the transfer?

A. Yes, sir; but of course I ratified it.

Q. 712. The transfer was made without your knowledge and consent?

A. My information was subsequent, and I ratified the whole thing.

Q. 713. But the transfer was made without your knowledge?

A. Well, I do not recollect precisely at the present time
567 whether I did not advise Mr. Selover that, if they would make this arrangement, I would agree to it; I am not satisfied in my mind—yes, sir; it was prior to that transaction that I advised Mr. Selover that if they would assume this thing and take it to themselves, they could take the whole thing.

Q. 714. Then you were mistaken in stating that your correspondence and information on this point were subsequent to the transfer?

A. Yes; then they agreed that they would take it; and I said: "Very well, gentlemen, take it; that releases me."

Q. 715. Then you were entitled to have your note, were you not?

A. Well——

Q. 716. You said "Very well, gentlemen?"

A. I suppose so; or words to that effect.

568 Q. 717. You did not say that to them personally; you wrote to that effect?

A. Yes, sir.

Q. 718. Did you keep a letter-press copy of that letter?

A. No, sir, because I was broken up in my business, and had no office at that time. I have not kept copies of my letters now for six or eight months; longer than that—twelve months.

Q. 719. It was a matter of some importance to you that the payment of this note of yours should be assumed by Mr. Dunham, and you relieved from the payment of it, was it not?

A. Yes, a matter of some importance; but in dealing with the men that I was dealing with it made no difference, and I am
569 satisfied that if it ever comes to a settlement, it will take a form that will be satisfactory to me.

Q. 720. But it was very satisfactory to you to learn that your note was to be paid by Mr. Dunham, and that you were to be relieved from it?

A. Yes, sir; very satisfactory.

Q. 721. And you do not know whether you kept the evidence of that or not?

A. Of which?

Q. 722. Of the fact that you were relieved from the payment of this note?

A. I think I have got the letter; and, if so, I will give it to you.

Q. 723. But you are not sure whether you have that letter or not?

570 A. I will look for it; and, if I have it, I will give it to you.

Q. 724. But you are not sure?

A. No, sir.

Q. 725. Did you thereupon then demand the surrender of your note?

A. No, I did not.

Q. 726. Did you not know that that note sold to a *bona fide* purchaser, transferred by General Ihrie to a *bona fide* purchaser, would be recoverable against you?

A. Yes; but I am dealing with gentlemen who do not do that sort of things.

Q. 727. You knew that General Ihrie would not sell that note?

A. Yes, sir; after making that arrangement he would lose
571 his life rather than put it into any other place than the channel in which it was intended to go.

Q. 728. If you knew that, as a fact, General Ihrie had offered to sell that note after that transaction, you would have a very b[ad] opinion of him, would you not?

A. It would sound most extraordinary; it would be a m[ost] amazing thing to me; it would astonish me beyond measure.

Q. 729. Do you know where that note is now?

A. I do not.

Q. 730. You have never asked have you; never inquire[d] of

A. No.

Q. 731. I think you said you knew Mr. T. K. Wils[on]

572 A. Yes, sir; I do know him.

Q. 732. Prior to the date of what you call the deed of trust——

A. (Interrupting.) I do not call it anything.

Q. 733. Prior to March 28th, 1874, did you ever tell T. K. Wilson that you had no interest in the Morgan mine, except what Mr. Irvine might choose to give you?

A. No, I never did in my life.

Q. 734. Nor anything to that effect?

A. No.

Q. 735. Did you ever make that statement to T. K. Wilson in his office?

A. No; nor in any other place.

573 Q. 736. Did you make that statement to him immediately prior to the 28th of March, 1874?

A. To him?

Q. 737. Yes, sir.

A. No.

Q. 738. Nor at any other time?

A. Nor at any other time, nor at any other place.

Q. 739. Did you ever state to Mr. H. J. Tilden, the partner of Mr. T. K. Wilson, prior to the 28th of March, 1874, that you had no interest in this mine, except what Mr.——

A. (Interrupting.) I never had any conversation with Mr. Tilden on the subject in any way, *pro* or *con*, at any time, on any subject touching this matter.

Q. 740. Do you know Mr. Samuel Hanna?

574 A. An old gentleman, an elderly gentleman?

Q. 741. Yes.

A. Yes.

Q. 742. Did you ever make any such satement as that last referred to to Mr. Samuel Hanna?

A. No, sir.

Q. 743. Did you ever make such a statement as that last referred to to Mr. George Irvine?

A. No, sir.

Q. 744. Did you ever make such a statement as that last referred to Mr. Robert Irvine?

A. No, sir.

Q. 745. There was one question that I forgot to ask you
575 with respect to Morgan's estate; did any assets ever come to your hands, as the administrator of Morgan's estate, other "[illegible]an his interest in the Morgan mine?

A. No, sir; no other thing.

Q. 746. From what court did letters of administration issue to you in the matter of Morgan's estate?

A. The probate court of the city and county of San Francisco.

Q. 747. Have you any letter-press copies of letters that you wrote, either to Mr. Selover or Mr. Fair, relating to the matters in and about the Morgan mine, other than the one you have exhibited here?

A. A great many of them.

Q. 748. Will you produce that book here to-morrow, and let us see those letters referring to the matter?

576 A. Well, touching the Morgan mine, my correspondence with them runs over a long period of time, and I have a large number of books containing letters relating to the business connected with this mine; we had a great deal of business about it that don't touch anything about this case at all; I will bring the books to-morrow morning, and give the books to Mr. Wilson.

Mr. GARBER: We want all the letters which have any bearing upon the matters here in controversy.

(Here an adjournment is taken until to-morrow, 4th inst., at half-past eleven a. m.

577 THURSDAY, *January* 4, 1877.

Present: Mr. Wilson, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendant, and Mr. R. H. Sinton, the witness under examination.

(By agreement, the time for taking the testimony herein, on the part of the plaintiff, is extended until Thursday, 18th instant, and the examination of the witness, Sinton, is continued until Monday, 8th instant at half past 1 o'clock p. m.)

578 MONDAY, *January* 8, 1878.

Present: Messrs Wilson and Hayes, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendants.

Cross-examination of R. H. SINTON resumed:

Q. 750. Mr. BOTTS: You said that you had a letter-press copy of your letter to Mr. Selover, in which you informed him of the conclusion that had been reached in the negotiation, in December 1871, conducted by Mr. Samuel M. Wilson, on the part of Mr. Fair, over, and Colonel Barnes for Mr. Fair. Will you produce it?

579 A. I did not tell you I had a letter-press copy of that at all. I said I had a memorandum, and produced the memorandum here. You have the memorandum filed here now.

Q. 751. You said you wrote to Mr. Selover, informing him of the conclusion that had been reached, and he never answered your letter?

A. At that time I was broken up in my business, and did not take letter-press copies of all the letters that I wrote; I did not tell you I had a letter-press copy of that.

Q. 752. You had no letter-press copy of that letter?

A. I have not looked among my letter books to see whether I have or not; but about that time I was broken up in my business, and

580 my affairs were all in confusion; I don't think I had any copy of it; certainly I did not testify to any such thing.

Q. 753. Did you not generally keep letter-press copies of the letters that you wrote upon this subject?

A. Letters upon important business matters; sometimes I did keep them, and sometimes not.

Q. 754. Don't you know now whether or not you have got a letter-press copy of that letter?

A. No; and I think you are mistaken in relation to my testifying to that; I advised Mr. Selover: I might make an examination of all the letters written about that time that I have, and see if I have got any such thing, and, if so, I will give it to you; but I advised him of what had taken place, but received no answer in relation to the matter, and there the thing dropped, so far as I was con-

581 cerned.

Q. 755. You said you had a letter-press copy of the sheriff's letter to Mr. Irvine, informing him that the mine had been knocked off to a friend of his, who would convey [it] to Mr. Irvine?

A. I did not so state, and if so reported the reporter has made a mistake in my answer; I stated that I wrote to Mr. Fair on that day that Mr. Irvine had just shown me a letter; I think Mr. Irvine read the letter to me.

Q. 756. You mean to say that you did not take a letter-press copy of the sheriff's letter?

A. Of course not; the letter was never in my hands; I stated the proportion just now—that I had written to Mr. Fair on that day that such was the fact, and of that letter I had a letter-press copy.

582 Q. 757. Have you got a letter-press copy of the letter that you wrote to Mr. Fair in 1870?

A. Yes, sir.

Q. 758. Will you produce it?

A. I will read it to you.

Q. 759. I want to see it.

A. I don't propose to give these books (referring to letter copy-books) to anybody; I will read the letter if you like.

Q. 760. Will you produce the letter?

A. I will not give you or anybody else access to my letter books; I will read you that letter if you want it for the reporter to take down.

Q. 761. Will you let me see the letter?

583 A. No, sir, I will not let any one see the letter, or any letters in my books; I will give them to you right at once if you want them; I will give you the whole of them *seriatim*.

Q. 762. You refuse to produce that letter?

A. I will not give you or any one else that letter, unless you want it in evidence; I will read it.

Q. 763. You will not produce that letter?

A. I will give it to you after I have read it, so that you can verify it as being in the book as I state it is printed there, but I won't open these books for anybody living; these are books containing my private correspondence, and I do not propose to have them examined by anybody, unless I am absolutely compelled to do

584 so; I will give you the whole of the letters, and the reporter can take them down.

Q. 764. Will you give me that letter?

A. I will give it in evidence here, to the reporter.

Q. 765. What time was it that you stated you paid Mr. Irvine $105.19.

A. Some time in March, 1870.

Q. 766. Where did you give that money to Mr. Irvine?

A. Down at this place; I think it was in Front street.

Q. 767. What did you say to him?

A. I do not recollect what I said to him.

Q. 768. Did you say anything to him?

A. I guess I did.

585 Q. 769. What was it that you said; the substance of what you said?

A. The probabilities are that I said: "Here is the money to pay for that tax title and expenses."

Q. 770. What did he say?

A. Well, I do not recollect that he said anything.

Q. 771. He did not say anything?

A. I did not say he did not. I do not recollect his saying anything.

Q. 772. You do not recollect his saying anything?

A. No.

Q. 773. Did you tell him you had got the money—the check from Mr. Fair?

A. Well, I could not say that I did, at this distant day—
586 whether I told him at that time that I had got the money from Mr. Fair.

Q. 774. Don't you know that, whether you did or not?

A. No; I could not tell now.

Q. 775. Did you not give that money to Mr. George Irvine to give to Mr. William Irvine?

A. No; I guess not; I don't think I did; I think my recollections are very clear that I gave it to William Irvine himself, in person. Such a thing might possibly be that I might have handed it to George Irvine and said, "Give this to William Irvine." It might possibly be so; but I do not think it was.

Q. 776. Couldn't be that you gave that money to Mr. George Irvine, and asked him to give it to Mr. William Irvine, and
587 not tell him where it came from?

A. Well, in pursuance to the policy of innocency, and one thing and the other, such a thing might possibly be the case.

Q. 777. What do you mean by "pursuant to the policy of innocency?

A. The policy was to obtain, as I have stated on several occasions before, a tax title that, if upon investigation, would stand the legal test of being in an innocent purchaser.

Q. 778. What do you mean by "an innocent purchaser?"

A. Without privity between the parties who actually held the legal title to the ground, who would derive no benefit if there could be shown any collusion with the party buying in the title for their benefit.

588 The REPORTER: Mr. Sinton, this is your last answer, as I understood it: "Without privity between the parties who actually held the legal title to the ground, who would derive no benefit if there could be shown any collusion with the party buying in the title for their benefit." Is that correct?

A. It is not; my answer was, that if the matter should be questioned at any time, there would be no privity, or could be no privity shown between the legal owners of the property and the purchaser at tax sale.

Q. 779. Mr. BOTTS: You say that in March, 1871, Mr. Irvine gave you a memorandum of expenses; that you copied it in your letter to Mr. Fair, of February 27th, 1871?

589 A. No, I did not say he gave it to me in March, 1871.

Q. 779. (Repeated.)

A. I never said so.

Q. 780. Are you sure that your letter contains a full and exact copy of the memorandum handed to you by Mr. Irvine?

A. Well, I never stated that in March, 1871, he gave it to me, and that, in February of the same year, I sent a copy of it to Mr. Fair; that would be simply ridiculous, and I never stated any such a proposition at any time; you have simply got the dates mixed.

Q. 781. You say (referring to transcript) that, in February,

1871, Mr. Irvine gave you a memorandum of expenses; that you copied it into your letter to Mr. Fair of February 27th, 1871?

A. That is what I said.

590 Q. 782. Are you sure that that letter contains a full and exact copy of the memorandum handed you by Mr. Irvine?

A. I haven't a doubt of it.

Q. 783. Will you look at the paper which I now hand you, and tell me whether that is the memorandum of expenses that Mr. Irvine furnished you in February, 1871?

A. No, sir; that is not the one.

(The paper referred to is marked Exhibit No. 12.)

Q. 784. Did you ever see that paper before?

A. Yes, sir; I have seen that paper before.

Q. 785. Are not the words "March, 1871," written in pencil, on that exhibit, in your handwriting?

591 A. Yes, sir, they are; that is the reason why I testified that I had seen it before.

Q. 786. Are not the words "March 1st, 1871," endorsed on this paper in your handwriting?

A. Yes, sir.

Q. 787. Then this document, Exhibit No. 12, was shown to you before the 1st of March, 1871?

A. No, it was shown to me March 1st, 1871—doubtless on that day. This is not the one that was furnished me, because the other one that was furnished me, my recollection is distinct, was upon one of these stubs—memorandum scraps—was on a thing of that sort. Probably I asked him for the items that made up the $925; I do not recollect; but that (Exhibit No. 12) evidently has

592 been in my possession, because it has my writing on it; but the other was exactly as I have copied it in that letter to Mr. Fair.

Q. 788. When you wrote to Mr. Fair, on the 27th of February, 1871, you had not seen that paper (Exhibit No. 12)?

A. I do not think I had; probably I asked him for a bill of items, and he sent me that.

Q. 789. In the letter to Mr. Fair of February 27th, 1871, you say: "In above is six months' wages to Douglas, keeper, at one hundred dollars per month?"

A. Yes, sir.

Q. 790. How did you know that at that time, if you had never seen this paper, and had received nothing from Mr. Irvine, except that memorandum which is copied into the letter?

A. Mr. Irvine told me so, doubtless.

593 Q. 791. You stated, after looking at the account of expenses appended to the deposition of General Ihrie, that that account did not agree with the account of expenses rendered to you?

A. I was speaking then in relation to that matter of $910 in a lump.

Q. 792. You say "The amount paid to T. K. Wilson, including his fee of fifteen dollars, was $105.19, which I paid to Mr. Irvine. He has got it $123.50." Now I ask you if, in the account of expenses rendered to you by Mr. Irvine, there was an item of $105 and a fee to Mr. Wilson of fifteen dollars?

A. This matter has no connection with that in any way.

Q. 793. What did you mean when you answered that the
594 amount paid to Mr. Wilson, including his fee of fifteen dollars, was $105?

A. Simply that I was informed by Mr. Irvine that that was the amount that was due at that time. I sent to Mr. Fair for the money, and got it, and paid it to Mr. Irvine.

Q. 794. Did he render you any account of the fifteen-dollar fee paid to Mr. Wilson?

A. No; he simply stated to me that the $105.19 included that fee.

Q. 795. Included the fee of fifteen dollars?

A. Of Mr. Wilson, yes, sir. That is what my letter states.

Q. 796. You were asked, "The item of John Douglas, getting possession of the mine, traveling expenses, &c., and $110.75;" do you know anything of that? You answered: "The item is
595 furnished in the paper which I spoke of a while ago, which contains a general account of $600 for six months' salary to Douglas, and $510.25 was still due in February, 1871." Now I ask you what paper was that?

A. I never said that that item was *furnished* in that account at all; I said it was probably included in this amount; I could not have said anything about it, because this memorandum shown in my letter to Mr. Fair was the whole account, as given to me on that occasion, February 27, 1871.

Q. 797. Then your answer to that question asked by Mr. Wilson —that question being: "The item of John Douglass getting possession of the mine, traveling expenses, &c., $110.75; do you know anything of that:" is not correctly reported?

A. It is not correctly reported.

596 Q. 798. You stated nothing of that kind in answer to that question?

A. No; I did not state anything of that character; the matter was misunderstood, or misquoted, or misreported, as you please.

Q. 799. What, then, is your answer to that question?

A. My answer to that question is that it is included in that amount, I presume—whatever the amount expended up to that time was—in this amount of $910.25, that was rendered up to the 27th of February, 1871; there was no items at all there; the whole thing is before you.

Q. 800. You never said in answer to that question: "The item is furnished in the paper which I spoke of awhile ago?"

597 A. No, sir; I may have said it was *included.*

Q. 801. You never said that that paper which you spoke of "contains a general account of $600 for six months' salary to Douglas, and $510.25 was still due in February, 1871?"

A. Yes, sir, I did. I did say that.

Q. 802. You did say that—that the paper which you spoke of "contains a general account of $600 for six months' salary to Douglas?"

A. I did.

Q. 803. What paper was that?

A. That was the letter of February 27th, 1871, containing the memorandum that had been furnished by Mr. Irvine, and of which I was advising Mr. Fair on that date. It reads: "I have
598 just received from Mr. Irvine a memorandum, as follows:

"Sundry expenditures	$910 25
"Cr. by cash	400 00
"Balance	$510 25

"Let him or myself hear from you by return. In above is six months' wages to Douglas, the keeper, at $100 per month." That is the whole of the paper under discussion.

Q. 804. Did that memorandum or paper which you forwarded to Mr. Fair contain an item of "six months' salary to Douglas?"

A. I did not forward any memorandum from Mr. Irvine to Mr. Fair at all.

Q. 805. You say that you forwarded to Mr. Fair the memorandum of expenses that Mr. Irvine furnished you?

A. No, sir; I never said so. Here is what I said to Mr. Fair. (Reads letter as it appears in answer to Q. 803, *supra.*)

599 Q. 806. In that letter, is there any item of "John Douglas getting possession of the mine, traveling expenses, &c., $110.75?"

A. No, sir; I have read you the whole thing.

Q. 807. In the account of expenses which was in your possession on the 1st day of March, 1871, rendered by Mr. Irvine, there is an item, is there not, of "Amount paid Wilson, $123.50?"

A. Exhibit No. 12 contains such an item.

Q. 808. And that corresponds with the item in the account expended to General Ihrie's deposition, does it not?

A. I have not noted particularly; I presume it does.

Q. 809. You told me you would furnish me a memorandum
600 that you made of the items going to make up the total of four hundred dollars paid to Mr. Irvine, did you not?

A. Yes, sir; I will endeaver to do so; my official duties have been such that I have not had a moment's time; I would like to give it to you.

Q. 810. When will you do that?

A. I will endeavor to do it at your next meeting; I will do so with the greatest possible celerity.

Q. 811. Can you not get it now?

A. I cannot get it now; I will endeavor to give you the items as they were paid, if I can produce them; I don't know as I can; my whole guide in the matter in this memorandum from Mr. Irvine, at that date, as to the gross amount that had been paid; I
601 may not be able to produce a memorandum of the dates and items as they were paid to him. I know I can produce the date of the payment of the $105.19, and fifty dollars paid the day that Douglas was sent to take possession of the mine. That would be $155, and possibly I can give one or two other times when I may have advised Mr. Fair as to the time that I paid him the money, or that I may have received it from Mr. Fair and paid it to him. That would be the only way which I could get at it. I will rummage through everything that I have got to see if I can give you those facts and items.

Q. 812. Did you consider that in refusing to convey to Mr. Fair and Mr. Selover for less than twenty thousand dollars Mr. Irvine was violating the implied agreement with you?

602 A. I did. I thought his charge was very extravagant and extortionate—heavy.

Q. 813. Did you ever reproach Mr. Irvine for a breach of honor in his implied agreement with you?

A. No; we never came to any personal matter about the thing at all. There has never been a personal word between Mr. Irvine and myself, except that our personal intercourse ceased when this thing took this shape.

Q. 814. When Mr. Irvine showed you the letter of notification to Fair and Selover requiring them to comply with their agreement to pay this twenty thousand dollars, five thousand cash and fifteen thousand guaranteed in twelve months, did you reproach him, then, with the fact that he was taking any advantage of the agreement with you?

603 A. No, sir; on the contrary, I wanted to know where I was going to come out; these other men had not responded to my correspondence upon the subject, and whether they had abandoned it or not was a matter unknown to me; I wanted to know where I stood then, and he gave me the assurance that I should stand in the same position with him as that in which I stood with Mr. Selover under his verbal promise; I stated the other day that I had nothing to do with that notice; it may have been, and probably is the case that I altered or corrected, or amended in some may, the general verbiage of that notification; that is now my recollection of it, as I begin to think more about the thing; the conversation between me and Mr. Irvine took place on the steps of the custom-house.

604 Q. 815. Then you did think that in retaining the title to this property which he had acquired at the tax sale, and not

conveying it to Mr. Fair and Mr. Selover, Mr. Irvine was acting dishonorably?

Obj. (Objected to by plaintiff's counsel, as irrelevant and immaterial.)

A. By no means; asuming that an abandonment had been actually made by Mr. Selover and Mr. Fair, the tax title vest in Mr. Irvine; and, no one having any right to object, I was moved to protect myself.

Q. 816. You and Mr. Irvine agreed between you, as you have stated in your examination, to divide between you the fruits of that purchase at the tax sale?

A. We agreed that he and I were mutually and equally
605 interested in any outcome of that property that would be equally acceptable to us both.

Q. 817. Have you got the letters that you say you received from General Ihrie and Mr. Dunham proposing to release you from your debt to General Ihrie if you would consent to the absolute conveyance to Mr. Dunham?

A. I haven't had time either to look for them or the items of that account. I will give you my word that I will make the most diligent search; but I have been, by force of circumstances—my office has been broken up, has been twice removed since that time, and my private affairs are in the utmost confusion; and it will require some considerable time to straighten them up and see where these letters are, and all about them.

606 Q. 818. Did you receive any such letters from General Ihrie or Mr. Dunham?

A. From both General Ihrie and Mr. Dunham.

Q. 819. Before you consented to the transfer to Mr. Dunham by General Ihrie?

A. Yes, sir.

Q. 820. Did you not state on your examination the other day that you knew nothing of it until after the transaction?

A. They made the transaction, subject to my approval.

Q. 821. Then the transaction was made before you knew of it?

A. Among themselves in New York; yes, sir.

Q. 822. Did you write your approval of it?

A. I believe Mr. Selover came here just about that time.
607 I don't know. There was no necessity of my writing my approval when he was here.

Q. 823. But it was General Ihrie and Mr. Dunham who made the transaction, was it not?

A. General Ihrie and Mr. Dunham and Mr. Selover; General Ihrie and Mr. Selover made this guarantee.

Q. 824. What guarantee?

A. The guarantee that they made among themselves, you know, that they would secure me and pay General Ihrie his debt.

Q. 825. Was that what you were informed was the condition of the conveyance from General Ihrie to Mr. Dunham?

A. Yes; that is the very gist of it.

Q. 826. And you are sure that you were informed by Gen-
608 eral Ihrie and Mr. Dunham that that was the condition of the transfer from General Ihrie to Mr. Dunham?

A. (Nods.)

Q. 827. And you got that information as an inducement to you to consent to such transfer?

A. Yes, sir.

Q. 828. General Ihrie, in his deposition, states that the consideration for which he had conveyed to Mr. Dunham was that Mr. Dunham should guarantee to him the payment of your note?

A. That is just what I have told you; I have not seen the deposition of General Ihrie, but what you state from it is precisely what I have just this instant told you.

Q. 829. Did you not state that you understood from Gen-
609 eral Ihrie and Mr. Dunham that this arrangement between Ihrie and Dunham paid your note?

A. No, sir; I did not state any such thing.

Q. 830. Did you not understand that the inducement to you to consent was that the debt due from you to General Ihrie was thereby settled and paid?

A. By those three; not settled and paid, but that they held me harmless in the premises.

Q. 831. When one guarantees the payment of another's note, does that, in your opinion, pay the note?

A. It depends on the ability of the men to pay it, whether it is an obligation——

Q. 832. (Interrupting.) If Mr. Dunham guaranteed that your note should be paid, and he did have to pay it under that
610 guarantee, would he not have a claim upon you to pay him the note?

A. Well, now you are asking questions that I don't know whether there is anything in the matter or not; I have endeavored to explain to you that I consented to this upon the guarantee that I was to be held harmless in this note.

Q. 833. You are sure that you kept those letters?

A. Well, Judge Botts, I think I have them.

Q. 834. Would you not necessarily keep the letters which furnished you the only evidence that you were not to be called upon to pay the note?

A. I would, as a precautionary measure, take the ordinary care of such communications, but I may have mislaid them, or
611 they may have been disturbed or lost in moving twice my private office, as I have told you.

Q. 835. You are a more than ordinarily good business man, are you not?

A. No; I think in my private affairs that I have exhibited almost a negligence in the conducting of them.

Q. 836. That would be very great negligence in a business man not to keep the evidence of the payment of his note—the only evidence that he could have of it, would it not?

A. You are putting in that word "payment" again; it was guaranteed that I should be held blameless in it.

Q. 837. So far as you were concerned that would amount to a payment, would it not?

A. Yes, sir, I suppose so.

612 Q. 838. It would be a very great piece of negligence in a business man not to keep the evidence that a note amounting to some five or six thousand dollars was discharged, when it was the only evidence that he had of it, would it not?

A. I have trusted a great many men, and I have been egregiously deceived by a good many.

Q. 839. I ask you again, if it would not be a very extraordinary piece of negligence for a man not to preserve the only evidence that he had that an outstanding note of his for five or six thousand dollars was discharged?

A. I answer that simply by saying that I may have lost or mislaid the paper; I have probably got it yet.

Q. 840. You said that it was at your suggestion and under
613 your directions, acting for Mr. Fair and Mr. Selover, that Mr. Fair instituted a suit against Mr. Irvine, in which he attached the title that Mr. Irvine had obtained to the Morgan mine under the tax sale?

A. I did.

Q. 841. And that in that suit it was intended and desired that Mr. Irvine should be successful?

A. It was.

Q. 842. What was the object of instituting that suit?

A. That when the tax title should be conveyed to my order and direction it would stand as a matter that had been adjudicated upon, and there could be no question raised in regard to it; that was the idea.

614 Q. 843. Mr. Barber, you state, was also consulted?

A. He was the lawyer in the matter for Mr. Fair—H. P. Barber.

Q. 844. Did he advise you that a determination of a suit brought by Mr. Fair against Mr. Irvine, impeaching that title, and decided in favor of Mr. Irvine, would in any manner affect a suit brought by Addison and others for the purpose of attacking that title?

A. Do you mean the original suit for their legal claims, as they called them—their old claims.

Q. 845. Their suit against Mr. Irvine?

A. They had two suits; one against the tax title and one against Mr. Irvine himself.

Q. 846. Was the object of that suit brought by Fair and

615 Selover to procure a determination of the validity of the title obtained by Mr. Irvine at the tax sale to operate against the other claimants, Addison and others, in their claim against Mr. Irvine, when they sued him in ejectment?

A. It was for the avowed purpose of having an adjudicated title that would rule out the world.

Q. 847. Did Mr. Barber advise you that such a determination would rule out the world?

A. Mr. Barber did so advise.

Q. 848. Henry P. Barber?

A. Henry P. Barber. We never would have had this suit——

Q. 849. (Interrupting.) Mr. Barber had the reputation of being a very fine lawyer, did he not?

616 A. We esteemed him to be an admirable lawyer.

Q. 850. His reputation was high at the bar, was it not?

A. It was; and we did this under his advice.

Q. 851. You said, I think, that you drew the papers that centered in Morgan the interests of those who held the Morgan mine in common with him, which were executed for the purpose of enabling him to sell the mine in London?

A. I was furnished with a large number of original papers and requested to center the title in Morgan, the professed object of which was that he should proceed to London and sell that mine.

Q. 852. Then you did know that those conveyances that
617 centered the title in Morgan were for the purpose of enabling him to sell the mine?

A. Well, yes; I stated that purpose for the purpose of selling the mine; whether they retained their interests in the mine or not, I do not know; I have some evidence.

Q. 853. What do you mean by that?

A. There were numbers of them—Addison, Hays, Rice—a quantity of them, and Judge Rice tells me that he provided a defeasance or declaration to this effect, and read it to me; the thing has passed out of my mind, but he tells me that that is a fact. Old Judge Rice is a man, I think, of the highest integrity, and he tells me that that was the paper he brought and read to me.

Q. 854. And you are satisfied now that he did show you
618 the defeasance that was executed to Morgan of these interests?

A. Judge Rice says he did; he says that he read that paper to me; but as I have told you, the thing had passed entirely out of my recollection, and, but for his assurance, I should know nothing about it, because I have no recollection of it.

Q. 855. Do you know how the suit of Addison and others *vs.* William Irvine, which was pending at the time of the compromise between those parties and William Irvine, which is in evidence here, marked Exhibit No. —, was finally settled?

A. I believe the whole proceedings were discontinued; I do not recollect what the legal steps were, but a compromise was made

and proceedings were stopped, or abandoned; I don't know what.

619 Q. 856. Do you recollect any of the terms of that agreement that you have read so often concerning the manner and mode in which it should be settled?

A. It speaks for itself.

Q. 857. I want to see how familiar you are with it. You say you had read it very often?

A. I know it was a paper of a great many pages. The general features of it were that one-half should go to Bacon and his people and one-half should go to Mr. Irvine, with a little reserved balance in thereof—I forget; some small interest—in such a shape that neither one nor the other should have the advantage of the preponderance of notes. But that was one of the most delicate——

Q. 858. (Interrupting.) Do you not remember that at that 620 time a judgment had been rendered in favor of the plaintiffs in that suit in the fourth district court, and that an appeal from that judgment was pending in the Supreme Court?

A. I believe that was the fact.

Q. 859. Do you not remember that it was agreed there that the plaintiffs should go into the Supreme Court and confess error and obtain an order for a judgment to be entered in favor of the defendant in the court below?

A. I believe that that was the fact.

Q. 860. Do you recollect after that was accomplished, in the summer of 1873—possibly about the month of June—Mr. Fair's speaking to you about that settlement?

A. No; I cannot place anything about it so far as Mr. Fair is concerned.

621 Q. 861. Do you remember having a conversation with one C. T. Botts, on or about the month of June, 1873, in my office, then in the Merchants' Exchange, on California street, in which you told me that Mr. Fair was very furious about that settlement, and that he threatened to bring suit for the property?

A. Such a thing may have been; I have forgotten it.

Obj. (Question 861 and the answer thereto objected to by plaintiff's counsel, as irrelevant, and as not being based upon anything brought out in the examination-in-chief.)

Q. 862. Do you remember telling me on that occasion, of Mr. Fair's talking so preposterously, and that you had, in making the arrangement with Mr. Irvine, purposely avoided any agree- 622 ment with him for a re-conveyance, which you knew would vitiate the whole transaction, and that you trusted to the supposition that Mr. Irvine would do what men usually did—reconvey to the party whose property was purchased for a moderate advance?

Obj. (The same objection.)

A. I have no recollection of the circumstance, but from the way in which Judge Botts recites it, such a thing might have been said.

Q. 863. Mr. Sinton, when did you obtain a copy of what you call a declaration of trust from Mr. T. K. Wilson?

A. Some month or two before the return of Mr. Irvine from Europe and the East.

Q. 864. Did you ever ask Mr. Wilson to give you the original?

623 A. No, I did not.

Q. 865. Was there any conversation between you and Mr. Wilson when you asked him for a copy of that paper?

A. Nothing particular. I asked him if he would give me a copy. He said, "The original is there, you can read it at any time. It is for the use of both of you."

Q. 866. That is all he said, was it?

A. Yes, sir; and he gave me a copy of it.

(It is admitted by defendants that the body of the paper Exhibit No. 12 is in the handwriting of William Irvine, defendant.)

(Here an adjournment is taken until to-morrow, 9th instant, at eleven o'clock a. m.)

624 TUESDAY, *January* 9, 1877.

Present: Mr. Wilson, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendants.

Re-direct examination of R. H. SINTON:

(Defendants admit notice to produce the deed from the sheriff of Calaveras county to William Irvine, conveying the tax title to the property in controversy.)

Q. 866. Mr. WILSON: Mr. Sinton, you spoke in your cross-examination of having had in your possession, at times, the drafts of the agreement which was subsequently consummated be-
625 tween Mr. Irvine and Bacon, and others. Did you state what period of time that negotiation covered?

A. I could not tell the exact time; it occupied a considerable extent of time though—several weeks perhaps.

Q. 867. How many conferences were there between you and Mr. Irvine upon that subject?

A. I could not say the number, but there was a great number of them, as I stated.

Q. 868. Where were they principally had between you; at what places—those conferences?

A. At his place of business in Front street and my place of business in California street. I do not recollect any other places. There might have been conversations at casual meetings that we had upon the same subject.

626 Q. 869. Were the drafts left in your possession at any time by Mr. Irvine for suggestion and examination and approval?

A. The draft—there was but one paper.

Q. 870. I mean the different papers that were prepared before that which was finally used?

A. They were so left with me, in my possession.

Q. 871. I understand you to say they were altered before the paper was agreed upon?

A. They were considerably.

Q. 872. I say, were those proposed agreements left in your possession by him for your examination and suggestions?

A. Yes, sir.

Q. 873. To be examined for suggestions by you?

627 A. Yes, sir; there were suggestions by him and by myself, at our mutual conferences.

Q. 874. Did he, during those consultations between you and himself on the subject of that compromise, ask your approval or suggestions as a party interested in the matter?

Obj. (Objected to as leading.)

A. Constantly.

Q. 875. Did Mr. Irvine, at any time or times, say anything to you in reference to concealing your interest in this matter; if so, what?

A. Upon very many occasions when we had conversations upon this subject—these interviews—he requested me, if I was asked in relation to any interest that I might have in the matter,

628 to disclaim it; he was afraid of that bank crowd—the Bank of California.

Q. 876. To whom did he refer in speaking of the bank crowd?

A. Thomas Brown, Henry D. Bacon, Hays, and all of the parties included in this adjustment; Judge Botts was one of the bank crowd at that time.

Q. 877. Will you look upon the paper, now produced here by the defendant, Mr. Irvine, under request of the plaintiff's counsel, and state whether or not that is the original of the account which you spoke of, and with which you and General Ihrie compared the copy annexed to his deposition?

A. Upon a casual inspection, I believe it to be the identical paper I copied. Without comparing it with that sworn, attested

629 copy of General Ihrie and myself, I could not say that it absolutely was the paper, but that is my belief now.

Q. 878. The endorsement on the back of it—"cash expenses paid on Morgan mine by William Irvine," in whose handwriting are those words?

A. They are in the handwriting of William Irvine, the defendant, I believe.

(The paper last above referred to is offered in evidence by plaintiff, and marked Exhibit No. 13.

It is admitted that said paper is all in the handwriting of William Irvine, defendant, with the exception of the printed bill-head.

It is agreed that the copy of said account, Exhibit 13, annexed to the deposition of George P. Ihrie herein, may be
630 taken for the purpose of this trial as the original, reserving to defendant the right to have the original account produced on the trial, if desired.

It is admitted, with the right to correct it, if found to be incorrect; that the following is a statement of the names of the parties, and the number of shares issued to each, to whom the stock of the Morgan Mining Company was issued, shortly after the organization of said company:

	Shares.
Henry D. Bacon	5,926
J. C. Hays	837
Frank Coffee	345
John Coffee	156
H. P. Irvine	178
W. A. Addison	937
William Hance	1,049
C. T. Botts	357
—— Murphy	424
William Irvine	9,787
	19,996
Capital stock	20,000

631 Four short, made up of fractions to sundry of above.

It is also admitted that Mr. Irvine, the defendant, transferred to Mr. Samuel Hanna twenty-five shares of this stock at about the time of the organization of the company.

It is also admitted that at the time of the commencement of this action, February 25th, 1876, the following-named persons constituted the board of trustees of the Morgan Mining Company: Charles T. Botts, Samuel Hanna, William Irvine, T. K. Wilson, H. P. Irving.

It is also admitted that the C. T. Botts above named is counsel for defendant, and that the T. K. Wilson above named is the same T. K. Wilson referred to by witness in this deposition.

632 It is admitted that the amount of stock set down opposite the name of Murphy was purchased by the corporation and distributed among the other stockholders *pro rata*, in proportion to the other shares which they respectively held.)

Q. 879. Mr. Sinton, from the time of the agreement made between you and Mr. Irvine, to which you have referred, in which he agreed that upon the failure of Fair and Selover to accept the

proposition that he had made to them, you and he should stand as equal owners in the property—I say, from that time down until the time of your transfer of your interest to General Ihrie, how often were you and Mr. Irvine in consultation in reference to your joint interests in that property, and to the steps which should be
633 taken towards securing title and towards the disposition of the property?

A. I could not specify the number of times, but they were a great many; I might say, possibly, a hundred times, and be within bounds.

Q. 880. Were any, and, if so, how many of those interviews sought by Mr. Irvine himself?

A. That I could not say; these interviews were sought and held at the mutual convenience or desire of either calling upon the other.

Q. 881. What proportion of these interviews was brought about by yourself, and what proportion by him?

A. Well, I could not say the exact number, but it was a mutual thing, and in all probability there was about an equal num-
634 ber brought about by each of us.

(The paper produced and referred to by the witness yesterday, and marked Exhibit No. 12, is offered in evidence by plaintiff.

It is agreed that a copy of said paper may be made and used in evidence, to have all the force and effect of the original.

It is admitted by counsel that the body of this memorandum, Exhibit No. 12, is in the handwriting of Mr. Irvine, the defendant, except the date in pencil at the bottom, "March, 1871," which is in the handwriting of Mr. Sinton. The endorsement on the back, "March 1st, 1871," is in the handwriting of Mr. Sinton, and the words "costs on the Morgan Mine," also endorsed on the paper, are in the handwriting of defendant Irvine.)

635 Q. 882. I understood you, on your cross-examination, to say that this Exhibit No. 12 was in your possession at one time, and that you recognize your handwriting on it. Can you explain, and will you give your best recollection at this time of how you become in possession of that memorandum at the time?

A. I received—that is my theory about that paper mem——

Obj. Mr. Botts: (Interrupting) We object to his theory.

Q. 883. Mr. Wilson: Give your best recollection of it.

A. This is my best recollection: Upon receipt of the little memorandum which I copied in my letter to Mr. Fair of the 27th of February, 1871, made up, I believe it was, of only two items
636 in bulk, a debit and a credit—a debit of $910.25, and a credit thereon of $400—I asked Mr. Irvine to specify the items, and I presume he handed me that (Exhibit No. 13) a day or two after. Mr. Fair is a peculiar man in his business relations, very particular, and in all my dealings with him I have endeavored to furnish him

particulars whenever he had to send me money to pay for the same. That is my best recollection of it.

Q. 884. During the period of time from your conversation with Mr. Irvine on the steps of the Custom House, down to the time of your transfer to General Ihrie, were you entrusted by Mr. Irvine with any papers or writings connected with, or referring to, the Morgan mines? If so, state generally what they were and for what purpose left with you?

637 A. I do not recollect, nor am I able to specify any particular papers, except the Bacon contract, compromise, or settlement—whatever it may be called.

Q. 885. As you have not answered the first part of the question, I will repeat the question.

(Q. 884 repeated.)

A. During the time specified, that is, the only paper that I can specify.

Q. 886. Although you cannot specify them, were any papers other than the Bacon contract entrusted to you, from time to time, by Mr. Irvine?

A. During this period that you have mentioned?

Q. 887. Yes, sir.

638 A. None that I recollect. (After reflection.) Yes; I do recollect now that the return of the survey by the United States surveyor, whose name I cannot now recall, was left in my possession for some time, and I started to make out the papers for the patent on the same, or rather, the papers for the application for the patent. We consequently went with these papers to Mr. T. K. Wilson, who took upon himself then to draw the papers in application for the patent. There I left this return of the survey.

Q. 888. Who took that return of the surveyor to you?

A. William Irvine, the defendant.

639 Re-cross-examination by Mr. GARBER:

Q. 888. Have you ever, since 1868, received from Mr. Fair or Mr. Selover any letters in relation to this Morgan mine?

A. Yes; I guess I have, a good many of them.

Q. 890. Have you those letters?

A. That I cannot tell until I overhaul all the letters that I have got.

Q. 891. We will request you to do that and to bring them all here, if you have any.

A. That I will do.

Q. 892. We want any letters that you have ever received from Mr. Fair or Mr. Selover in relation to this Morgan mine.

640 A. I will make due and diligent search, and if I can find them, give them to you.

Q. 893. How many letters books containing letter-press copies of letters written by you to Mr. Fair or Mr. Selover since 1868, in relation to the Morgan mine, have you now in your possession?

A. I do not think there [are] any touching directly upon this issue.

Q. 894. But how many books have you containing letter-press copies of letters written to either of those gentlemen in relation to the Morgan mine?

A. Three books.

Q. 895. Only three?

A. Only three.

641 Q. 896. Will you produce those three books here, and exhibit to us such letters, or copies of letters, from you to Mrs. Fair, or Mr. Selover, as are therein contained in relation to the Morgan mine, so that we may offer them in evidence?

(Obj. Mr. WILSON: We object to the question, because the same question was propounded to the witness before the cross-examination was closed; and the witness at that time offered to read in evidence any of the letters which are now referred to, and counsel did not avail themselves of the opportunity; and the witness declared upon yesterday that he would not produce any of his letters for inspection merely, but was willing, upon the proper question being asked, to put them in evidence; and the question is not now admissible, nor have the counsel a right to recross-examine upon the
642 subject-matter which they exhausted prior to the close of their cross-examination.)

A. I will read them, as I offered to do yesterday, from those books.

Q. 897. Mr. GARBER: Will you produce the books here, and exhibit those letters, and those only, to us, so that we may offer them in evidence, or do you decline to do so?

Obj. (The same objection.)

A. Not for inspection, with the privilege of the right of rejection.

Here an adjournment is taken until Thursday, 11th instant, at half-past ten o'clock a. m.

643 THURSDAY, *January* 11, 1877.

(By consent of counsel, a further continuance is taken until Monday, 15th instant, at eleven o'clock a. m.)

MONDAY, *January* 15, 1877.

At the request of C. T. Botts, Esquire, counsel for defendants, a further continuance is taken until to-morrow, 16th instant, at half past ten o'clock a. m.

TUESDAY, *January* 16, 1877.

(None of the counsel, with the exception of Mr. Wilson, appearing, the examiner further continues the hearing until two o'clock p. m., Thursday, 18th instant.)

644 THURSDAY, *January* 18, 1877.

(At the request of Mr. Wilson, a further continuance is taken until Saturday, 20th instant, at ten o'clock a. m.)

SATURDAY, *January* 20, 1877.

(By consent, a further continuance is taken until Thursday, 25th instant, at 10 o'clock a. m.)

THURSDAY, *January* 25, 1877.

(By consent, a further continuance is taken until Saturday, 27th instant, at ten o'clock a. m.)

SATURDAY, *January 27th*, 1877.

(By consent, a further continuance is taken until Monday, 29th instant, at two o'clock p. m.)

MONDAY, *January* 29, 1877.

(By consent, a further continuance is taken until Friday, February 2d, at two o'clock p. m.)

645 FRIDAY, *February* 2, 1877.

(Mr. Wilson (by Crockett) being present, counsel for defendant not appearing, the hearing is further continued until to-morrow, 3d instant, at half past ten o'clock a. m.)

SATURDAY, *February* 3, 1877.

(Further continued by consent, until Tuesday, 6th instant, at eleven o'clock a. m.)

TUESDAY, *February* 6, 1877.

(On motion of Mr. Garber of counsel for defendant, a further continuance is taken until two o'clock p. m.)

646 Afternoon.

(On motion of Mr. Garber, the hearing is further continued until to-morrow 7th instant, at eleven o'clock a. m.

WEDNESDAY, *February* 7, 1877.

(Further continued, on motion of Mr. Garber, until two o'clock p. m.)

Afternoon.

(Present: Mr. Wilson, of counsel for plaintiff; Mr. Botts, of counsel for defendants.)

(The witness not appearing at 2.30 oclock, a further continuance is taken by consent, until to-morrow, 8th instant, at 2 o'clock p. m.)

647 THUSRDAY, *February 8th*, 1877.

(Further continued, on motion of Mr. Wilson, until Saturday, 10th instant, at half past ten o'clock a. m.)

SATURDAY, *February* 10, 1877.

(The witness Sinton being unable to attend, a further continuance is taken by consent until Tuesday, 13th instant, at two o'clock p. m.)

TUESDAY, *February* 13, 1877.

(On motion of Mr. Botts, of counsel for defendant, a further continuance is taken until to-morrow, 14th instant, at two o'clock p. m.)

648 WEDNESDAY, *February* 14, 1877.

Present: Mr. Wilson, of counsel for plaintiff; Mr. Botts, of counsel for defendant.

Re-cross examination of R. H. Sinton resumed:

Q. 898. Mr. BOTTS: Mr. Sinton, in your testimony, page 145 of this transcript, you refer to a power of attorney from Mr. Dunham to you; have you got that power of attorney?

A. I now produce the power of attorney.

Said power of attorney is offered in evidence by defendant; a copy thereof to be made and appended to this deposition, to be of the same force and effect as the original, marked Exhibit No. 14.

Q. 899. Has the power been revoked?

649 A. It has not, sir, to my knowledge.

Q. 900. Do you know of any transfer from Mr. Dunham to anybody else of the property or interest conveyed in the deed from Ihrie to Dunham?

A. I do not.

Q. 901. You say (page 148 of this transcript) that the conveyance from you to Ihrie was made to secure an indebtedness; and you said also that you would refer to your memoranda and tell us the amount of that indebtedness; will you now tell us the amount of that indebtedness?

A. The amount that I owed him, I think, was about five thousand dollars, somewhere in that neighborhood.

Q. 902. Have you referred to your memoranda?

650 A. There was no memoranda that I made from which I could determine that question exactly.

Q. 903. You said—same page—that the indebtedness was evidenced by a note, and that you could get a copy of the note which you would furnish; have you a copy of that note?

A. There is some mistake about that. There was no copy of it kept, and hence I could not furnish a copy of it. My impression is that I intended to convey the idea that I could refer memoranda as to what the absolute amount of the indebtedness was between us at that day.

Q. 904. Do you not know where that note is now?

A. I do not.

Q. 905. Then it has never been surrendered to you?

651 A. It has not.

Q. 906. You stated (page 151 of the transcript) that you would look for the letters from Ihrie and Dunham to which you referred, and furnish them if you could find them.

A. I believe I did.

Q. 907. Have you looked for the letters?

A. I have, assiduously.

Q. 908. Have you found them?

A. I have not. In the moving of my office twice, rather compulsorily, by reason of the tearing down of buildings, I have lost the applications for nine running patents, together with the United States surveys; and the loss of those papers has caused me great annoyance, and I have in this search made the most diligent
652 search that I can make. A large basket of papers I can get no trace of. I have searched in every place that I can possibly think of, with a view to discover not only these letters that I promised Judge Botts, but also my mining patent claims. That gave me a great deal of annoyance and will cost me a good deal of money to replace, there being nine of them altogether. I have made a most scrutinizing search in every place where I could imagine that these papers could have been mislaid or misplaced.

Q. 909. Look at Exhibit No. 13 and state under what circumstances that paper came into your possession, and where?

A. To the best of my recollection, it was after the rendering of the memorandum account of the 27th of February, 1871, that I asked for this detailed account for the satisfaction of Mr. Fair, who
653 is a very peculiar man in relation to monetary affairs and a great many others. That is my recollection of it.

Q. 910. Did that paper come into your possession before or after the 27th of February, 1871?

A. I have no doubt it came into my possession on the date of that endorsement—March 1st, 1871.

Q. 911. Do you recollect that it did come into your possession at that time?

A. At that time? No; I could not say that.

Q. 912. It might have come into your possession earlier?

A. Yes, possibly; but the other came into my possession first—the one of the 27th of February, 1871.

Q. 913. When did the memorandum, as you call it, come into your possession?

654 A. On the day of its date, the 27th of February, 1871, as stated in that letter to Mr. Fair.

Q. 914. How many days were there in the month of February, 1871?

A. Twenty-eight days.

Q. 915. Did you transmit any copy of Exhibit No. 12 to Mr. Fair?

A. I have no recollection that I did. I may have exhibited it to him in person.

Re-direct examination:

Mr. WILSON. Did Mr. Irvine, the defendant here, ever speak to you prior to the commencement of this suit, and before your transfer of your interest in the property to General Ihrie, in reference to a denial on your part of your interest in the mining property; if so, what did he express to you as his wishes on that subject?

655

Obj. (Objected to by defendant, on the ground that it is not in rebuttal of anything that was drawn out on cross-examination.)

A. I had numerous conversations with Mr. Irvine. During these conversations he frequently requested of me if any one asked me in relation to any interest that I might have in the property simply to decline to answer, or to say if I chose to do so, that I had no interest in the property. What his point in that was I never did know, unless it was through some fears of the bank crowd, or the bank ring getting hold of it in some shape.

Obj. (The last clause of the answer is objected to upon the ground that it is not responsive to the question.)

656

(Plaintiff's counsel offers in evidence the original tax deed of the Morgan mining property to William Irvine, a copy of which, to be of the same force and effect as the original, to be annexed to this deposition, marked Exhibit No. 15.)

Re-cross examination:

Q. 917. Mr. BOTTS: How many of the conversations referred to in your last answer did you have with Mr. Irvine?

A. It is impossible for me to state how many, but we had them frequently.

Q. 918. When did you have the first conversation of that character with him?

A. I could not tell when.

657

Q. 919. Where did you have that conversation?

A. These conversations upon the subject-matter of the whole affair took place generally in his place of business on Front street, and my place of business on California street. Frequently we had conversation upon the street. Whenever we would meet it would be uppermost in our topics of conversation.

Q. 920. Did you ever deny that you did have any interest in the property?

A. If any one ever asked me about it I did.

Q. 921. Who asked you about it?

A. I believe you (Judge Botts) did once.

658

Q. 922. When did I ask you about it?

A. When, I could not tell you.

Q. 923. Where?

A. Where, I could not tell you. I could not with absolute cer-

tainty say whether it was on the street or whether it was in your office.

Q. 924. Did you ever deny it to anybody else?

A. If any one ever asked me I did.

Q. 925. Do you recollect any body to whom you ever denied it, except Mr. Botts?

A. I am not certain as to Mr. Botts, but my impression is that I did to him once; as to any other persons, I don't know whether any one ever asked me about it. If they ever did, I could
659 not call the individual to mind.

Q. 926. Are you certain that you ever denied it to any body?

A. I am certain of the fact that if any body ever asked me about it I did.

Q. 927. That is no answer to the question. Are you certain that you ever denied it to any body?

A. Well, at this late period I could not swear that I ever denied it to any human soul.

Mr. Botts. I now produce the letter from B. H. Thorne to the defendant, Mr. Irvine, of the date of January 10th, 1871, referred to by the witness in his examination-in-chief, and asked for by the plaintiff's counsel.

660 (Mr. Wilson proposes to call other witnesses and proceed with the examination to morrow morning.)

(Mr. Botts objects to the examination of other witnesses until the deposition of Mr. Sinton shall have been read, corrected, and signed by him.)

(The examiner rules that the examination shall proceed and other witnesses be called, pending the reading and signing of the deposition by the witness Sinton.)

(Mr. Botts announces that he shall appeal to the court from this decision of the examiner.)

(A continuance is then taken until to-morrow, 15th instant, at half-past ten o'clock A. M.)

661 THURSDAY, *February* 15, 1877.

Present: Mr. Wilson, of counsel for plaintiff: Mr. Botts and Mr. Garber, of counsel for defendant.

Mr. Wilson's proposition to proceed with the testimony of other witnesses without waiting for the reading and signing of this deposition by the witness, Mr. Botts' objection to said proposition, and the decision thereon of the examiner, are submitted to Judge Sawyer in chambers.

The court overrules the decision of the examiner, and directs that further examination be suspended until Mr. Sinton shall have read, corrected, signed, and completed his deposition.

Mr. Wilson thereupon states that he will consider the ex-
662 amination of Mr. Sinton as closed; and it is stipulated and

agreed by and between the respective counsel that the reading of the deposition to or by the witness, and the signing thereof by him, are waived; the examiner to append to this deposition a certificate to that effect.

Plaintiff's counsel offers in evidence the paper writing of the 28th of March, 1874, signed by William Irvine, defendant, and witnessed by T. K. Wilson and H. J. Tilden, a copy of which is hereto annexed, marked plaintiff's Exhibit No. 2.

It is admitted by defendant's counsel that all the signatures thereto are the genuine signatures of the parties whose names purport to be signed to the same.

It is further agreed that the copy hereto appended shall be
663 taken and treated as the original.

Here a recess is taken until two o'clock p. m.

Endorsed: Filed Sept. 25, 1877. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

664 Circuit court of the United States, ninth circuit, district of California.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

Be it remembered that on this 15th day of February, A. D. 1877, at my office, in the United States Courts Building, in the city of San Francisco, State of California, before me, J. F. O'Beirne, an examiner in chancery, duly appointed by the circuit court of the United States for the ninth circuit, and district of California, personally appeared Lizzie M. Sinton, W. H. L. Barnes, James H. Dane, Henry D. Bacon, Thomas Brown.

Witnesses on behalf of the complainant in the above entitled action:

Samuel M. Wilson, Esqire, appeared as counsel for said complainant, and Charles T. Botts, Esquire, and John Garber, Esquire, as counsel for the respondents.

And the said witnesses having been by me first cautioned and duly sworn to testify to the truth, the whole truth, and noth-
665 ing but the truth, in the cause aforesaid, did thereupon depose and say as follows, that is to say:

Deposition of Lizzie M. Sinton.

Examination-in-chief of Lizzie M. Sinton by Mr. WILSON:

Question 1. Please state your name and place of residence.

Answer. Lizzie M. Sinton, San Francisco.

Q. 2. Are you the wife of Richard H. Sinton?

A. I am.

Q. 3. How long have you been married to Mr. Sinton?

A. Twenty years last November, the 26th.

Q. 4. Are you acquainted with the defendant, William Irvine?

A. I am sir. I have seen him a good many times.

666 Q. 5. Were you present upon any occasion when any conversation occurred between Mr. Irvine and Mr. Sinton in reference to the mining property usually called The Morgan Mine? If so, please state the first time such conversation occurred, and at what place, and, as nearly as you can, what was said by each of the parties.

A. The first I remember was when we were living in number 16, South Park, and my husband was confined to his bed by sickness, Mr. Irvine came there to see him in regard to placing a man in charge of the Morgan mine; a man whom he knew very well, but whom my husband did not know. Mr. Sinton asked him if he knew the man to be thoroughly honest. He said he did; knew him to be just the man for the position. Mr. Sinton said: "I will have to trust that to you, because I know nothing about him, but keep me advised as to what you are doing." He said, "I certainly will, I am doing this for you, and I shall keep you advised, because you know all about the matter, and I know nothing." That was the first conversation I remember. They talked a good deal longer,

667 but I do not remember particularly what else was said. But that I remember very well.

Q. 6. Can you give about, or approximate the date of that conversation?

A. Well, we lived in that house from 1868 until September, 1871. I do not remember nearer than that. It was while we were in that house.

Q. 7. Will you state what occurred at any other interview on the same subject, and when and where it was?

A. The second conversation that I remember, we were living at the Nucleus. We went to the Nucleus in September, 1871, and this conversation I remember perfectly, occurred in March, 1872. My husband was again confined to his bed, and Mr. Irvine came down to see him. He had been to the mine, and he came to report to Mr. Sinton about the mine, and I was very much depressed in spirits, for my husband was very sick, and he was in a great deal of pecuniary trouble at the time, and Mr. Irvine turned to me and said, "Mrs. Sinton keep a good courage, just as soon as your hus-

668 band gets his title here, he will have more money than you and he can spend." And after he left, I asked my husband if Mr. Irvine would cheat him out of his interest. He seemed to have so much faith.

Mr. Botts: We object to that: what occurred after Mr. Irvine left.

Q. 8. Mr. Wilson: Is there anything else that occurred during the interview while Mr. Irvine was present that you recollect of on the subject other than you have stated?

A. I do not.

Q. 9. Are those the only two interviews in which you recollect any conversation.

A. The only two in which I myself was present. I know he came down frequently to South Park to talk to my husband about that mine, but I was not in the room, because my husband was not sick then, and I did not happen to be present, but I know he came a great many times to talk about that matter.

669 Q. 10. Do you remember of his visiting your husband at the Nucleus at other times than the one you have referred to?

A. Oh, yes, sir; he was there several times during that illness. Mr. Sinton was confined to his bed about twenty-three days, and he was there several times during that time.

Q. 11. Do you know of any other relation of friendship or business, or any tie or connection between Mr. Irvine and Mr. Sinton, other than that growing out of this mining transaction?

A. I do not, sir; I never heard his name mentioned until in connection with this mine.

Q. 12. Independently of this mine, did Mr. Irvine occupy any position of social relation or connection to Mr. Sinton?

A. Not at all, sir.

Q. 13. Nor to any member of his family?

A. Not to any member of our family at all.

670 Cross-examination by Mr. GARBER:

Q. 14. When did you go to reside at South Park?

A. We went first in 1866, the 16th of April, but we lived in 36 South Park at first. Then we moved to number 16, in the winter of ——

Q. 15. (Interrupting.) Number 16 was the place where you first saw Mr. Irvine?

A. Yes, sir.

Q. When did you move to number 16 South Park?

A. In December, 1868.

Q. 17. How long did you remain there?

A. Until September, 1871.

Q. 18. As near as you can come to it, when was it that this first conversation occurred?

A. I really cannot say, judge.

671 Q. 19. State as nearly as you can, about how long was it after you first went number 16 to live?

A. Well, I think it was not very long; but I do not remember.

Q. 20. About how long do you think it was?

A. Well, I don't know; I haven't the slightest idea.

Q. 21. Do you think it was a year after you went there?

A. No; I do not think it was as long as that; I think it was, perhaps, only a few months; that is my impression, although I cannot be sure of it at all.

Q. 22. Do you know what day of the week it was that he came there?

A. No, I do not.

Q. 23. Just state over again what occurred on that occasion.

672 A. He came to consult Mr. Sinton about putting a man in charge of the mine.

Q. 24. Please state as nearly as you can just what was said at that conversation. Did you meet him at the door?

A. No; I was in my husband's room.

Q. 25. He rang the bell and the servant——

A. He rang the bell and the servant spoke to my husband and he was sent to the bed-room, where my husband was in bed and I was sitting at the window.

Q. 26. What was said after he got into the room?

A. He talked first about his sickness.

Q. 27. About your husband's sickness?

A. Yes, sir; said that he was very sorry to see him sick and so on and said he had come down to talk with him about the mine
673 and about the man—a man to be placed in charge of that mine.

Q. 28. Did he mention the man's name?

A. I do not think he did; no.

Q. 29. What else was said?

A. Mr. Sinton said: "I don't know any thing about him. I will have to entrust that to you;" and Mr. Irvine said he knew him to be a thoroughly good man and fit for the position. Then my husband said: "Be sure to keep me advised of what you are doing." He said: "I will; I am doing this for you and won't do anything without advising you, for you know all about the matter and I know nothing."

Q. 30. That was what Mr. Irvine said?

A. Yes, sir.

Q. 31. About what matter?

A. About the Morgan mine.

674 Q. 32. Mr. Irvine said he knew nothing about the mine?

A. Yes, sir; but Mr. Sinton knew, and he should have to consult him in regard to any step he took in the matter.

Q. 33. How long did Mr. Irvine stay there?

A. Mr. Irvine staid there about an hour; certainly not more than that.

Q. 34. Is that all you can recollect that was said about the Morgan mine?

A. That is all I remember that was said about the Morgan mine; I think I was called out of the room, and did not hear all the conversation, but I was not gone very long.

Q. 35. The next time you saw Mr. Irvine——

A. (Interrupting.) Not the next time; I saw him a good many times.

Q. 36. The next time you heard any conversation between him and your husband——

675 A. Was up in the Nucleus, in March, 1872.

Q. 37. How can you fix that date?

A. Because I know my husband was sick on St. Patrick's day,

and could not get to the window to look at the procession, and asked me to open the window so that he could hear the music, and I did so, and told him about the procession.

Q. 38. That was the same day that Mr. Irvine called?

A. No, sir; I do not think that Mr. Irvine was there on St. Patrick's day, but it was during that sickness.

Q. 39. It was during that sickness that you heard this second conversation?

A. It was during that sickness that Mr. Irvine came there.

Q. 40. And that is the way you fix that date?

676 A. Yes, sir; we were only at the Nucleus ten or eleven months, that is all, and I fix the date in that way.

Q. 41. What conversation occurred on that occasion?

A. Well, I do not remember everything they said.

Q. 42. State what you can recollect of what they said.

A. He said that he had been up to the mine and he had come there to tell Mr. Sinton that everything was in fine condition, and that he thought it was very rich. He talked a great deal about the richness of the mine; and then when he was about to leave he said to me: "Mrs. Sinton, keep up good courage, when Mr. Sinton gets this title to the mine here, he will have more money than you and he can spend."

Q. 43. Is that all that he said?

677 A. That is all that he said; after that he left the room.

Q. 44. Had you told him that you were in low spirits?

A. No; but I had said that I had been very much alarmed at my husband's illness; I had said nothing, however, except that I was depressed about his health.

Q. 45. And he told you to keep up your spirits?

A. "Keep up good courage." Of course I knew all about this mine.

Q. 46. Why did he tell you that, to keep up good courage.

A. I don't know why he should have said that, but he did; perhaps he thought I knew that this thing was in dispute.

Q. 47. Was it in litigation at that time?

A. Yes, sir.

Q. 48. How do you recollect?

678 A. Because I have heard of the mine ever since I was married.

Q. 49. You recollect that it was at that time in litigation?

A. Yes, sir.

Q. 50. With whom?

A. That I don't know.

Q. 51. You do not recollect that?

A. No.

(Signature waived by agreement of counsel.)

679 *Deposition of W. H. L. Barnes.*

Examination-in-chief of W. H. L. BARNES by Mr. WILSON:

Question 1. You are a resident of the city of San Francisco?

Answer. Yes, sir.

Q. 2. For how long have you been such?

A. Since the 28th day of April, 1863.

Q. 3. You are an attorney and counsellor-at-law in regular practice?

A. Yes, sir.

Q. 4. And have been ever since your arrival?

A. Yes, sir.

Q. 5. Are you acquainted with Mr. Irvine, the defendant here?

A. Yes, sir.

680 Q. 6. Do you remember ever having any interviews with Mr. Irvine at the office of S. M. Wilson, one of the attorneys for the plaintiff in this case; if so, please state what was the subject-matter of the interview at that time, and what took place between the parties there, whom you represented, and whom Mr. Wilson represented?

A. There was an interview at Mr. Wilson's office at some time prior to the fall of 1871; Mr. Wilson represented as I understood Mr. A. A. Selover; I represented Mr. James G. Fair; I think Mr. Sinton was present on his own account, and Mr. Irvine was there for himself; Mr. Irvine claimed to have the title to the Morgan mine, the other parties claiming an interest in it; the principal subject of discussion was the interests of the parties in the property, and what arrangement could be made with respect to it; my recollection is that Mr. Irvine claimed that by virtue of his deed all the other parties had lost their interests; he offered to sell them the property for twenty thousand dollars, five thousand in cash

681 and fifteen thousand dollars on a credit of one year; Mr. Wilson represented that his client, Mr. Selover, was then at the East, in New York, I believe, and it would be necessary for him to communicate with him before anything could be said on the question of this proposed sale; I was in favor myself of making the purchase, but it was not carried through.

Q. 7. What was the deed or title that Mr. Irvine claimed?

A. My present best impression is, a title derived under a sheriff's deed, following a tax sale or something of that sort; but it is a number of years since I have heard anything about it, and my memory is not of the best in respect to it, after such a length of time and such a multitude of other things that have glutted me since then.

Q. 8. Your recollection is that it was what is ordinarily called a tax title?

A. Yes, sir.

682 Q. 9. Do you know of any transactions which subsequently took place between Mr. Irvine, Mr. Thomas Brown, and

others, in relation to an account which Mr. Irvine presented as against them, in reference to this Morgan mine, and an adjustment of an account between them? If so, state what you know upon that subject, and how you came to know it, and where the transaction took place.

Mr. BOTTS: State only what you know of your own knowledge.

A. At Mr. Brown's request, some time in the early part of November, 1871, I had one or more interviews with Mr. Irvine in respect to the Morgan mine. Mr. Irvine said that he had expended certain moneys for account of the property, which he desired Mr. Brown and his associates to reimburse him. He furnished me a statement which amounted to nine hundred and fifty dollars. I saw Mr. Brown about it, and either obtained from him personally or through one of my clerks, a check drawn by Mr. Brown him-
683 self, upon the Bank of California, to the order of Mr. Irvine, for that amount. Subsequently Mr. Irvine stated that that amount was not correct; that it should be increased by additional items not mentioned at the former interview. I communicated this to Mr. Brown, and he gave me another check for this difference, which was somewhere in the neighborhood of one hundred and eighty or ninety dollars. The second check, like the first, was drawn by Mr. Brown upon the Bank of California, payable to the order of Mr. Irvine. I directed Mr. Dane, managing clerk in my office, to deliver those checks to Mr. Irvine. He returned with a receipt for the money, signed by Mr. Irvine, which remained, with other papers relating to the property, in my possession until the latter part of 1874, when, as appears by a book I keep in my office, they were all—everything relating to the Morgan mine—papers relating to the Morgan mine in my possession—were delivered to Mr. Thomas Brown at the Bank of California.

Q. 10. Mr. WILSON: I now produce to you two checks upon
684 the Bank of California, signed by Thomas Brown, trustee, payable to the order of William Irvine, one dated November 15th, 1871, for nine hundred and fifty dollars (marked Exhibit No. 16), and the other dated November 20th, 1871, for one hundred and ninety-eight dollars and fifty cents, marked Exhibit No. 17. Having looked at them, please state whether or not they are the checks to which you have referred.

A. (After examination.) They both correspond in dates and amounts, with my recollection of the transaction, and I believe them to be the same. The one for nine hundred and fifty dollars was in my possession a day or two, and when the additional check was drawn, both of them were sent to Mr. Irvine. I remember that I offered to return the nine hundred and fifty dollar check to Mr. Brown, and to take a new check for the whole amount, but he did not desire to lose the stamp, or had some reason for giving me a second one instead of a check for the whole amount.

685 Q. 11. Are you acquainted with the handwriting of William Irvine; have you ever seen him write?

(It is admitted by defendants' counsel that the endorsements upon the back of Exhibits Nos. 16 and 17, "Wm. Irvine, J. H. & Co.," are in the handwriting of William Irvine, defendant.)

(Said Exhibits Nos. 16 and 17 are here offered in evidence by plaintiff.)

Q. 12. Will you please look upon the paper now produced to you, and marked Exhibit No. 18, and state in whose handwriting the same is, and what the document or memorandum is?

A. (After examination.) The body of the document or account—purported account—is in the handwriting of a clerk in my office. The endorsement is in the handwriting of James H. Dane, then and now my managing clerk.

Q. 13. Was that one of the papers and documents turned over by you to Mr. Brown to which you have referred?

686 A. Yes, sir. The original of the account was turned over to Mr. Brown, and I preserved this copy. I may say that, in all cases where the office receives and pays out money for people, we keep a copy of the transaction, as far as we can, and an endorsement is made upon it as to what occurred at the time.

Q. 14. This paper, then, I understand you, was one of your office papers, made cotemporaneous with the transaction as a record of what was done?

A. Yes, sir; as to what we had done.

Q. 15. Was the endorsement upon the back of it, as there made by Mr. Dane, made by him in the ordinary course of business as a clerk in your office?

A. Yes, sir; according to the rule in the office.

(Plaintiff here offers in evidence said Exhibit No. 18.)

687 Mr. BOTTS: We object to it, as it is stated to be a copy of an original paper, the absence of which is not accounted for, and more than that, it is not even proved to be a copy.

Q. 16. Mr. WILSON: Do you remember whether, in my office or yours, there was, at or about the time of the interview between Mr. Barnes and Mr. S. M. Wilson, several interviews substantially to the same purport as the one to which you have referred?

A. I cannot remember more than the one I have stated.

Q. 17. Do you remember at this time how the amount of the consideration—that is to say, the twenty thousand dollars—was arrived at whether or not in part it consisted of items of disbursement or expenditure upon the mine by Mr. Irvine?

A. Mr. Irvine claimed at that time that the mine was indebted to him for advances in taking care of and protecting the property; and it was for these advances and for his services and for his

688 title that he wanted the twenty thousand dollars.

Q. 18. Do you remember now, Mr. Barnes, whether the interview between Mr. Irvine, Mr. S. M. Wilson, and yourself

preceded or succeeded the time of the transaction to which you have referred in connection with the checks?

A. Well, there was no great difference of time between them; I don't know that I could say with certainty which preceded the other; my recollection is not sufficiently good to enable me to say which came first, but they could not have been very far apart.

(Signature waived by consent of counsel.)

689 *Deposition of James H. Dane.*

Examination-in-chief of JAMES H. DANE by Mr. WILSON:

Question 1. State your name, business, and place of residence, and how long you have been engaged in your present occupation.

Answer. James H. Dane. I have been engaged as managing clerk for Mr. Barnes for the last four years, and as his clerk for over seven years altogether.

Q. 2. Will you please look upon the paper here presented to you, marked Exhibit No. 18? Examine the face of it, and the paper attached to it, and the endorsement on the back, and state what you know regarding the same, and the matters therein referred to.

A. (After examination.) This is a copy of the particulars of Mr. Mr. William Irvine's claim for the disbursements to the 20th of November, 1871. The original of this paper was handed to Mr. Thomas Brown of the Bank of California by me on the

690 20th of November, 1871. Mr. Brown had previously handed me a check for nine hundred and fifty dollars, payable to William Irvine, or order, and he subsequently handed to me one, payable in like manner, for the balance of the account shown by the particulars I refer to, of which this is a copy. The second check amounted to one hundred and ninety-eight dollars and fifty cents, making together the sum of eleven hundred and forty-eight dollars and fifty cents, the amount of the total of the items contained in the paper. Both of these checks were, on the same day, November 20th, 1871, handed by me to Mr. William Irvine in settlement of that claim.

Q. 3. In whose handwriting is the endorsement on the back of that exhibit, to which there are the initials "J. H. D.?"

A. That is my handwriting.

Q. When was that memorandum made by you?

691 A. Made on the day of the date it bears, to wit, November 20th, 1871.

Q. 5. Was that made by you in the ordinary course of your business in Mr. Barnes' office?

A. Yes, sir.

Q. 6. You had no interest in the premises whatever?

A. No, sir; nothing more than the performance of a clerical function.

Q. 7. Will you look upon the two papers now produced to you, marked respectively Exhibits Nos. 16 and 17, purporting to be

checks signed by Thomas Brown, payable to William Irvine or order, dated respectively November 15th and 20th, 1871, and state whether or not they are the checks to which you have referred?

A. (After examination.) Those, I have no doubt, are the checks to which I have referred.

Q. 8. Were you acquainted with the handwriting of William Irvine?

692 A. No; I was not.

Q. 9. Do you remember from whom you received the original of the account here?

A. I expect that I first received it from Mr. Barnes, with instructions to attend to the matter. I do not remember distinctly. I think that was what happened.

Q. 10. Did you have the original of that account with you at the time you went down to see Mr. Irvine?

A. Yes, sir; I believe I did. It formed the subject of my conversation with him.

Q. 11. How many interviews did you have with Mr. Irvine on the subject?

A. I expect two; I don't know but more.

Q. 12. Did you tender him the first check for nine hundred and fifty dollars by itself?

A. Yes, sir; I took it down to him and tendered it to him in payment of his claim.

693 Q. 13. What did he say at that time?

A. He said that was not sufficient, but there were other items of the account.

Q. 14. Did he at any time furnish you with a memorandum of the items?

A. Yes, sir.

Q. 15. Was that the bill of which this bill (Exhibit No. 18) is the copy?

A. Yes, sir; it resulted in an original, of which this is the copy.

Q. 16. Then, upon obtaining the additional amount, one hundred and ninety-eight dollars and fifty cents, you returned to him and had a second interview, in which you delivered to him these checks?

A. Yes, sir.

Cross-examination by Mr. BOTTS:

694 Q. 17. The body of Exhibit No. 18 is not in your handwriting?

A. No; it is in the handwriting of the office boy.

Q. 18. Can you state, of your own knowledge, that this is a correct copy?

A. Yes; I haven't the least doubt of it, sir.

Q. 19. I did not ask you whether you had any doubt about it. Do you remember what the original paper contained?

A. I remember nothing of the contents?

Q. 20. Do you know what this copy contains?

A. I know that that is a copy of the original paper that it purports to be a copy of.

Q. 21. How do you know that that is a copy of the original paper of which it purports to be a copy?

A. From my system of doing business.

Q. 22. How do you know now that that is an original
695 copy, not being in your own handwriting, and not remembering now what the original was, and not knowing what the copy is?

A. I know, from having stated, in my own handwriting, at the time, that it was a copy of it. I should not have stated it unless it was so.

Q. 23. Then you have no recollection of the matter, and your testimony is based upon a memorandum, in your handwriting, made upon the paper; is that so?

A. I know, by that memorandum, that this is a copy of the original paper.

Q. 24. But, but for this memorandum, you would not be able to state that that is a copy?

A. But for the memorandum, I would not be able to state that this is a copy.

Q. 25. And now, having looked at the memorandum, do you, after having refreshed your memory, by looking at the memo-
696 randum, do you now remember the fact that this is a copy?

A. Yes, sir; by that memorandum I remember the fact that it is a copy.

Q. 26. Now, having looked upon this memorandum, you remember that this a copy of the original?

A. Yes, sir.

Q 27. Then, if you remember, after having refreshed your memory, that this is a copy of the original, you can, of course, tell me what the original contained?

A. By reference to that paper I can.

Q. 28. But without reference to that paper, if you remember it, you can tell?

A. No, sir: I can tell by reference to the paper only.

Q. 29. I am drawing the distinction, or attempting to, between your testifying merely upon the faith of that memorandum, aud the fact that the memorandum itself has so refreshed your
697 memory as to enable you to remember without the paper. [Pause.] You do not remember now what were the contents of the original paper?

A. No.

Q. 30. Even after having your memory refreshed by looking at this memorandum?

A. I have not looked at it with sufficient minuteness to be able to refresh my memory as to the contents.

Q. 31. Now look at it, and tell me, after doing so, if you remember the original.

A. (After examination.) No; outside of the fact of the memorandum that I have made here, and a vague impression of the transaction having taken place, I have no further recollection on the subject.

Q. 32. You would not swear that these words, "J. K. Wilson," were in the original, would you?

A. I would; yes, sir.

698 Q. 33. You are sure of that?

A. Yes, sir.

Q. 34. You are as sure of that as of any thing you have stated, are you not?

A. Yes, sir.

Q. 35. You are willing to swear that the name here, "John Hardy," was in the original?

A. (After examining memorandum.) Yes, sir.

Q. 36. You remember that distinctly?

A. Yes, sir.

Q. 37. And you are just as sure of that as of anything you have stated?

A. I am.

Q. 38. You spoke of these checks, which are marked, respectively, Exhibits Nos. 16 and 17; look at this check for one hundred

699 and ninety-eight dollars and fifty cents; is that check now precisely as it was when you received it from Mr. Brown?

A. (After examination). I conclude it is.

Q. 39. I ask you if you know; can you swear it is?

A. No; I can not.

Q. 40. These words: "account of Carson Creek mine"?

A. (Interrupting). I cannot; it is not just as it was, because it has been paid since, and the stamps——

Q. 41. (Interrupting). Will you swear that these words; "account of Carson Creek Mine" were in that check when it was delivered to you by Mr. Brown; do you remember those words being in that check?

A. I have no doubt they were there.

Q. 42. You do not answer my question; I ask the question,

700 were these words in that check when you received it from Mr. Brown, and when you handed it to Mr. Irvine?

A. I think I have a recollection that they were in, for I think I recollect calling the attention of the clerk, who made out the check, to the fact of its being on the Carson Creek mine account.

Q. 43. Do you remember that those words were put in there at that time?

A. Yes; I think I do; I think I do.

Q. 44. They have not been inserted since?

A. No.

Q. 45. You remember that they were put in?

A. Yes, sir.

Q. 46. Can you tell me why they were not put in in the body here; was anything said about that?

A. Yes, sir; there was some conversation passed about that.

701 Q. 47. What conversation was there?

A. It was so long ago——

Q. 48. You do not remember the conversation?

A. Not distinctly.

Re-direct examination by Mr. WILSON:

Q. 49. Do you remember the tag which is attached to the principal paper here—Exhibit No. 18—upon which there is some memorandum in pencil?

A. That was fastened by me to this paper at the time that I made this memorandum; this must have been a paper that I made in the course of the arrangement with Mr. Irvine; this portion was entered by me, as it is in my handwriting; it is in pencil on the back as follows: "Paid by Mr. Fair to Henry P. Barber, $250; ex-

702 penses, $48.50, of man to Calaveras county, to record the Murphy deed."

Q. 50. That is in your handwriting?

A. Yes, sir.

Q. 51. On the upper portion of that tag, in pencil, there——

A. (Interrupting.) I don't know whose handwriting that is in, sir.

Q. 52. Examine this tag, which contains upon one side of it an erased memorandum of "Provisions, groceries," &c.; I will ask you whether that paper was not obtained by you from the store of William Irvine, and whether he, or his firm, was not at the time you went to his store, dealing in articles of that kind, enumerated in that erased memorandum?

A. (After examination.) I do no remember, sir; I remember going to the store very well, but I have no distinct recollection of the kind of goods I saw there; I think I went straight into a little counting house on the left as you enter, and I did not notice

703 what goods there were there.

Q. 53. Can you account for the memorandum in pencil upon this tag being made upon the back of a paper containing a memorandum, which seems to have no connection with the transaction at all.

A. (After examining tag.) I cannot.

Q. 54. In whose handwriting are the figures at the top of this tag?

A. I do not know whose handwriting that is in.

Re-cross-examination by Mr. BOTTS:

Q. 55. Mr. Dane, how came you to make that memorandum in pencil upon the piece of paper that is attached to this Exhibit No. 18?

A. I am quite at a loss to account for it.

Q. 56. Can you state how it came to happen that that piece
704 of paper was attached to the other piece of paper?

A. I should conclude——

Q. 57. (Interrupting.) No; what you remember.

A. No; I do not remember.

Q. 58. When you paid this money to Mr. Irvine in the checks to which you have referred, drawn by Mr. Brown in his favor, did you take from him any receipt for the money?

A. I do not remember, sir.

Q. 59. Did you ask for a receipt?

A. I do not remember; I don't think I took any receipt.

(Signature waived by consent of counsel.)

(Here a continuance is taken until Saturday, 17th instant, at half past ten o'clock a. m.)

705 *Deposition of Henry D. Bacon.*

SATURDAY, *February* 17*th*, 1877.

Present: Mr. Wilson, of counsel for complainant; Messrs. Botts and Garber, of counsel for respondents.

Examination-in-chief of HENRY D. BACON by Mr. WILSON:

Question 1. What is your name?

Answer. Henry D. Bacon.

Q. 2. What is your place of residence, and how long has it been such?

A. Oakland, California; I have resided there since 1867.

Q. 3. Are you the person of the name of Henry D. Bacon, one of the parties of the second part in an agreement of the 14th of April, 1873, between William Irvine, of the first part, and Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry P. Irving, Charles T. Botts, William Hanna, and John
706 C. Hayes, of the second part, marked Exhibit No. 19 herein?

A. I am.

Q. 4. You are the same Henry D. Bacon named in a certain instrument or power of attorney, dated the 10th of December, 1872, signed by John Coffee, Frank L. Coffee, William A. Addison, John C. Hays, and Henry P. Irving?

A. I am.

Q. 5. Did you have anything to do with the negotiations which preceded the execution of the instrument of the 14th day of April, 1873, referred to; if so, what part did you take in the negotiations prior to the execution of this written agreement?

A. I did; I was regarded as the main negotiator of the settlement between the parties of the first part in the agreement, and the party of the second part; the power of attorney was given for the purpose of enabling me to make the negotiation.

707 Q. 6. Prior to the commencement of those negotiations had you known William Irvine; and, if so, for how long?

A. I had never known him until the summer of 1872.

Q. 7. Were the negotiations referred to the cause of your first acquaintance with him?

A. They were.

Q. 8. Over what period of time did the negotiations run from the commencement until the execution of this instrument?

A. I think they commenced before the power of attorney, which was executed in December, 1872, but some time in the year 1872 and continued up to the time of the execution of the agreement, the 14th of April, 1873.

Q. 10. How many interviews during that period of time did you have with Mr. Irvine

A. It would be impossible for me to state, but they were a great many—numerous.

708 Q. 11. Were there any previous drafts made of the agreement which were qualified and altered *pro* and *con* by the different parties prior to their agreeing to the terms of the final agreement?

A. There were a great many alterations made in the draft of the agreement. I think the draft of the agreement was originally written by Tilden and Wilson, and it was not acceptable at all to the parties that I represented or myself; or, at least we regarded it in a great many respects unacceptable; and there were a great many changes suggested, and some made. It was a work of a great deal of conference and a great deal of deliberation on both sides; I suppose certainly on ours.

Q. 12. Do you know Richard H. Sinton; if so, how long have you known him?

A. I do know him. I have known him, commencing, I think with 1874, some time, but I do not remember the precise time.

709 Q. 13. Did you know of him and who he was prior to that time?

A. Yes, sir. I never had any personal acquaintance with him until some time after the execution of this agreement we are considering.

Q. 14. During the time of the negotiation which resulted in the execution of the agreement of the 14th of April, 1873, did William Irvine ever refer to Mr. Sinton in any way in connection with the matter?

A. He made frequent references to Mr. Sinton in connection with the title of the property we were laboring over.

Q. 15. Please state what you now recollect of his references to Mr. Sinton, and what he said in that respect.

A. I could not do more than state the substance of conversation so long ago.

Q. 16. Please state the substance.

A. He represented that Mr. Sinton was acting——

710 Q. 17. (Interrupting.) This was during the negotiation?

A. Yes, sir; during the negotiation. He represented Mr. Sinton as representing the interests of Selover and Fair; that Mr. Sinton was also a very warm and trusted friend of Mr. Irvine's; that in some way, not then explained to me, he was interested in the property.

(The power of attorney from Coffee and others to Barber, above referred to, is here offered in evidence by plaintiff, marked Exhibit No. 20.)

(Objected to, as irrelevant and immaterial.)

Q. 18. After the execution of the instrument of the 14th of April, 1873, referred to, did you at any time have any conversation with Mr. Irvine, referring to Mr. Sinton, in connection with this mine; if so, please state as nearly as you can what Mr. Irvine said at one or more times; and if you cannot state his language, give the substance of it as near as you are enabled to.

711 A. From the time of the execution of the instrument up to the time of the receipt, or the advice of the issuing of the patent, Mr. Irvine and myself were talking principally upon the subject of patent, the manner of accomplishing or getting the patent, what he had done, and what he was doing, &c.; I do not remember now the precise time, but it was in the spring of 1874; I should say in March, perhaps after the middle of March, 1874, he came to my office and informed me that he had intelligence from Washington that the patent had or would issue; I think he said had issued; and that he had been drawn on for two hundred dollars by the agent that he had employed there to assist in the matter. At that time that I speak of, when it was, exactly, I do not remember, he said he wished to give me some information in regard to the property. I might say, in passing, however, that he had frequently said to me that myself and the parties I represented had no earthly claim to this property; that he had got it into a shape that

712 it was for his interest to make a settlement with us, but we had no valid claim to it. At this time he said he wished to inform me more particularly about the matter than he ever had done before. He went on, then, to give me a history of how he had come into possession of the property, stating that he had been employed by Mr. Fair. I am not sure whether Selover or not, but by Fair. I am confident about that—to act as his agent and attorney in the premises; that the property had been neglected, so far as the payment of the taxes was concerned; that a judicial judgment, as I understand him, contradistinguished from the ordinary loss of property by tax titles.

Q. 19. Mr. Botts: (Interrupting.) He said he had been employed by Mr. Fair?

A. Employed by Fair as his agent and attorney to take care of the property; (continuing) had been obtained against the property. At that point I suggested to him that it was not a matter of

importance to me now; and that he had better be cautious
713 about communicating to me anything in relation to the property, as I might be, sometime or other, in the mutation of affairs, called upon to testify in regard to what he might have said in connection with it. He said he was indifferent to that; and went on still further to say that execution issued and the property was sold under that execution, and that a man by the name of T. K. Wilson, I think it was—it is Wilson, of Tilden & Wilson—that T. K. Wilson had bought the property under this execution sale; that subsequently Wilson, not desiring to own the property, or to make use of it, had authorized, I think, the sheriff to deed the property to Mr. Irvine, who took it, paid the sum that Wilson was to pay, buying it in the name of the parties for whom he was acting as agent—Fair, and perhaps Selover, I could not say positively, but I think Selover. In the same conversation, at the same time, he referred again to his friend Sinton, to whom, he said, he considered himself very much indebted in this whole matter; who had aided
him in various ways in regard to the property, with advice
714 and information, and that he was about to, or had, or would —I cannot now state the precise language—convey to him one half of his interest, which would be one-quarter of the property, or thereabouts. That was the substance of the conversation.

Q. 20. Mr. WILSON: Did Mr. Irvine, during the interview to which you have last referred, or at any other time, make a reference to any other paper or declaration that he had executed? If so, state what he said in that respect.

A. I do not recall any statement of that kind further than this that I have already given; that he had done, or would do, as I have stated—that is, convey to Mr. Sinton one-half of his interest. I cannot recall it, because I do not remember now of many subsequent conversations with Mr. Irvine. About that time I think he went away from San Francisco, and was gone until the middle of the summer, so far as my recollection serves me; just about that
time he went away; I am inclined to think that he must
715 have said that he had made a conveyance to Mr. Sinton; perhaps it was in view of his going away.

Q. 21. Do you remember, by anything you can refer to, whether or not he used the term "declaration of trust?"

A. My impression is that he did use that term, because he told me of Mr. Sinton's embarrassments, and it was not safe for Mr. Sinton to hold anything in his own name, and that any conveyance that he would make would be a conveyance in trust.

Q. 22. Do you remember whether, during the negotiation prior to the execution of the instrument of the 14th of April, 1873, Mr. Irvine ever stopped to consult Mr. Sinton, or made any statement of his intention to consult Mr. Sinton, on the subject-matter then under consideration?

A. I think I have already stated that Mr. Irvine spoke of the interest of Mr. Sinton in the matter, in connection with Fair and

Selover, and that he was in consultation with him, but I do
716 not remember any particular pause or stop in the matter, although what he said would indicate a consultation.

Cross-examination by Mr. BOTTS:

Q. 23. Mr. Bacon, was the name of Andrew J. Coffee attached as a subscribing witness to the original agreement of the 14th of April, 1873, Exhibit No. 19, herein?

A. It was; that is to say, his name was attached to the original agreement between the parties connected with that agreement of 1873, as a subscribing witness, and he afterwards acknowledged to the signatures, I think, of all the parties who signed that paper.

Q. 24. Do you know when his name was put upon that original paper—at what time—as a subscribing witness?

A. My impression now is, it was done when he attained the last signature, but what precise time that would be I could not tell.

717 Q. 25. Were you present when any of these parties acknowledged before Coffee that that was their signature, and when he appended his name to it?

A. I cannot speak with certainty in regard to any excepting my own signature. I know that he did execute that as a subscribing witness.

Q. 26. Don't you remember, Mr. Bacon, that you and C. T. Botts spoke about the fact that this agreement was in such a condition that it could not be put upon record, after Mr. Irvine left, in 1874, without having made his conveyance?

A. I do not remember anything of the kind. I remember that you (Mr. Botts) made the suggestion, and I said that it could be, and that it was put of record.

Q. 27. Don't you remember that it was a cause of regret, expressed both by you and myself, that it was not in a condition to be put upon record?

718 A. I have no such recollection. On the contrary, I said, as I did before, that, in fact, it was. I would say, in connection with that, that you expressed some surprise in court when you saw this paper in court with Andrew J. Coffee's signature as subscribing witness. What caused that surprise I don't know; certainly no conversation that I had with you in which I said that there was any embarrassment about it at all. I have no knowledge of any such thing.

Q. 28. You state that I, C. T. Botts, you remember, expressed a regret that it was in a condition to be recorded?

A. I will state, in connection with that, that there were three what we termed original agreements, one the counterpart of the other.

Q. 29. Mr. WILSON: Triplicates of one, do you mean?

A. Yes, sir; I do not remember now who had them. I
719 presume Mr. Irvine had one; I certainly had one, and pos-

sibly Mr. Botts had one. I cannot say as to that; but I know the agreement that I had was duly executed, and that it was sent to the recorder of Calaveras county for record, and it was duly recorded and returned, without any objections being made thereto for lack of execution; and I paid the money for it.

Q. 30. Mr. BOTTS: Did any body assist you in the negotiation that led to the agreement of April 14th, 1873, Exhibit 19 herein, and in framing that agreement?

A. Mr. C. T. Botts gave me great assistance. We were often in consultation in regard, not only to the agreement, but as to the entire settlement.

Q. 31. Did you not take legal advice upon the validity of the title that William Irvine had to this mine.

A. Do you mean to say outside of your own?

Q. 32. Yes; outside of mine.

A. Outside of yours; no, sir.

720 Q. 33. Did you not inform me, C. T. Botts, that Mr. Wilson and Mr. Barnes had both expressed to you the opinion that Mr. Irvine's title was good, and could be maintained in law?

A. I don't think I ever had any consultation with Mr. Wilson upon that subject. Mr. Brown employed Mr. Barnes to advise him; and it is very likely that I may have talked with Mr. Barnes, or that I may have received from Mr. Brown the result of his conversations with Mr. Barnes, and in speaking of it I may have spoken of it as though Mr. Barnes had been consulted. I cannot say that I did not. That would be the explanation of my consultation. I could say, with a great deal of pleasure, that at that time I relied very much upon your legal judgment in regard to this matter.

Q. 34. Did you ever communicate to C. T. Botts, or to any of the other parties associated with you in this agreement of the 14th of April, 1873, the fact that Mr. Irvine had informed you

721 that he bought this property for Mr. Fair, and held it for Fair and Selover?

A. The information in regard to that was given to me by Mr. Irvine, as I have stated in direct examination, some time in the spring of 1874, probably March; from the manner in which I answered the question before, you will perceive that I regarded it somewhat in the light of a confidential communication; that I suggested to him that it was imprudent to make such communications to me, and I had no business to communicate them to you or anybody else.

Q. 35. Then you did not communicate that fact to me or to anybody else associated with you in this agreement?

A. I have no recollection of making any such communication to you; I possibly may have to others; what time do you refer to, up to the present moment?

Q. 36. Up to the present moment.

A. Oh, several times, Mr. Brown.

722 Q. 37. Mr. Brown is no party.

A. He is a party with me.

Q. 38. I am speaking of C. J. Botts, or any of the parties to this agreement.

A. Let me look at the agreement. (Examines.) I do not see any of the names here; I do not remember communicating with you.

Q. 39. I ask the question with respect to those parties.

A. I answer, I do not recollect; I am certain that I did not communicate it to you.

Q. 40. Nor, that you remember, to any of those parties?

A. I do not, sir; no occasion for it.

Q. 41. Where were these various consultations between you and Mr. Irvine held?

A. Nearly all of them in my office, over the Bank of California.

723 Q. 42. Were they all in the city of San Francisco?

A. Yes, sir.

Q. 43. Did you not testify, in the matter of the arbitration between you and William Irvine, before Judge Cowles, that you were not in San Francisco in the middle of March, 1874?

A. No, sir; I did not. I might possibly have testified that I was not in the city on the 15th day of March, 1874, because I have been in the habit, frequently, of going up to a mine that I am claiming, and I have had a few days' absence at a time. But that I was in the city of San Francisco in March, 1874, and had this conversation with Mr. Irvine, there is no doubt about it.

Q. 44. What are your relations with William Irvine; are they friendly or otherwise?

A. I have a very great disrespect for him.

Q. 45. I did not ask you what your opinion was. I asked you what your relations with him were.

724 Mr. BOTTS: I move to strike out the answer. I asked you whether your relations with him were friendly or otherwise.

A. I have a very great disrespect for him.

Q. 46. I ask you the question: Are your relations with Mr. Irvine friendly or otherwise?

A. I do not have any friendly relations with a man I do not respect.

Q. 47. Your relations with Mr. Irvine are very friendly, are they not?

A. I think he is a very bad man.

Mr. BOTTS: I move to strike the answer out, as not responsive to the question.

Q. 48. I ask you again: Your relations with Mr. Irvine are very unfriendly, are they not?

A. I have no friendly relations with him or any other.

Q. 49. Is it not true that you and Mr. Irvine have not been on speaking terms for a year or more?

725 A. I do not remember the time that I ceased to recognize him, but I should think probable it was a year ago or more, perhaps more than that.

Q. 50. Did you not have a violent quarrel with Mr. Irvine, in which very harsh language was used by both of you, one towards the other?

A. I used very harsh language to him; I don't remember his using very harsh to me.

Q. 51. And there has been a misunderstanding between you from that time to this?

A. As I told you, I have no relations with him.

Q. 52. Do you recollect when that quarrel took place?

A. I should think it was in August or September, 1874, but I am not positive about the time.

Q. 53. Where did it occur?

726 A. In my own office.

Q. 54. Did you not have another quarrel with him in the Merchants' Exchange, in the office of C. T. Botts?

A. I suppose you would call it a quarrel: I don't know exactly what your understanding of a quarrel is; I denounced him as being a very bad, untruthful, unreliable man.

Q. 55. You don't know whether that would constitute a quarrel or not?

A. I don't know as it would; he did not seem to be anxious to quarrel very much; said I hadn't better use such language; it might be dangerous for me.

Q. 56. Were you absent from the city of San Francisco during the month of March, 1874?

A. I could not say particularly that I was. Do you mean all the month of March, 1874?

727 Q. 57. I say, at any time during the month of March, 1874, were you absent from the city of San Francisco?

A. I could not say that I was not absent; but I say possibly that I was here in the city in March, 1874.

Q. 58. What time in March, 1874, were you here?

A. I am under the impression, as I stated in my direct examination, that it was somewheres from the middle to the last of March, 1874, that I had the conversation referred to in that examination. If I was absent, it was probably before that time, or it might have been after that; I cannot say.

Q. 59. Did you not state in your examination-in-chief that, as near as you could fix the time, this particular conversation in which Mr. Irvine made the communication to you of the manner in which he had obtained this mine, took place in the middle of March, 1874?

A. I cannot say.

728 Q. 60. I ask you if you did not say that in your direct examination?

A. I say I have no recollection of stating it.

Q. 61. You now say that conversation might have occurred in the latter part of March, 1874?

A. I say it occurred in March. My impression is that it must have been somewhere from the middle to the last of March.

Q. 62. Were you in San Francisco after the 25th of March?

A. I could not say as to that. It is a long time since that time. I should like very much, if it is proper at all, to refer to that testimony. It was taken away surreptitiously from Judge Cowles' office, with other papers, and I have never been able to see it since.

Q. 63. I suppose you know what you swore to there?

A. That would show what I swore to there.

729 Q. 64. I say I suppose you know what you swore to?

A. I have no doubt about the matter, but I would like to be sure about the fact. Judge Cowles told me that you or Mr. Irvine took the papers.

(Signature waived by consent of counsel.)

730 *Deposition of Thomas Brown.*

Examination-in-chief of THOMAS BROWN by Mr. WILSON:

Question 1. State your name, residence, and occupation?

Answer. My name is Thomas Brown; residence, San Francisco; occupation, cashier of the Bank of California.

Q. 2. How long have you been connected with the Bank of California?

A. Nearly ten years; ten years this fall.

Q. 3. Are you interested with Mr. Bacon in what is called the Morgan mine?

A. I was interested in it.

Q. 4. And are still?

A. Yes, sir.

Q. 5. Do you know the defendant William Irvine, and how long have you known him?

731 A. I have known Mr. Irvine for several years; I cannot say exactly when I first became acquainted with him.

Q. 6. Were you one of the parties interested in the agreement of the 14th of April, 1873, Exhibit No. 19, between William Irvine on one part, and Henry D. Bacon on the other part?

A. I don't know the agreement that you refer to; I don't think I executed any such agreement.

Q. 7. Were you one of the parties interested in the mine?

A. I was interested in the property; the agreement, of course, I cannot testify to.

Q. 8. You had an interest in the mine at that time?

A. Yes, sir; I may have read the argument, but I do not remember whether I did or not.

Q. 9. Will you look upon the paper here produced to you,

732 and marked, respectively, Exhibits No. 16 and 17, and state

whether or not those were your checks, executed at the times they bear date?

A. Yes, sir.

Q. 10. Did they come into your possession again, in the ordinary course of business?

A. Yes, sir; ordinary course of business.

Q. 11. With the endorsements on the back of them, just as they are now?

A. Yes, sir.

Q. 12. They came into your possession as cancelled checks belonging to you?

A. Yes, sir.

Q. 13. I would ask you to look upon the paper, which is now in your custody, marked Exhibit No. 21, and state from whom you obtained the same, and what relation, if any, it has to the checks to which you have referred?

733 A. I received this, my impression is, from Mr. Barnes' clerk, stating that this was the amount of the expenses. I had first given a check, on the 15th of November, for nine hundred and fifty dollars on account of expenses, and my impression is he brought this statement to me, and told me there was a balance of one hundred and ninety eight dollars and a half still due; and I made this second check on the 20th of November for the balance of the account.

Q. 14. The two sums together making up the amount of that bill?

A. $1,148.50; yes, sir.

(It is admitted that said papar last above referred to is in the handwriting of William Irvine, defendant.)

(Said Exhibit No. 21 is offered in evidence by plaintiff's counsel.)

Q. 15. Prior to this time, had you a personal interview with Mr. Irvine upon the subject of those items?

734 A. I cannot say that I had, sir.

Q. 16. Had you upon the subject of the mine?

A. Well, I had talked generally with Mr. Irvine in regard to the mine.

Q. 17. What I want to get at is—did you have a previous conversation with him in reference to those payments? Do you recollect how you came to make those payments?

A. Those payments were made on the basis of an agreement or understanding made through Mr. Barnes; Mr. Barnes representing me in the property.

Q. 18. He having made the arrangement——

A. (Interrupting.) He made the arrangement, and arrived at the understanding in regard to the payment of these expenses.

735 Cross-examination by Mr. BOTTS:

Q. 19. You were aware, were you not, of the compromise

that was made by Bacon and those who were associated with him in this agreement of the 14th of April, 1873, and William Irvine?

A. I was advised of the settlement between Mr. Irvine and Mr. Bacon and other parties.

Q. 20. You made no objection to it?

A. No; I made no objection to it.

Q. 21. Mr. Brown, you paid those checks, did you?

A. I gave those checks on the Bank of California.

Q. 22. What money did you pay them out of, your own money?

A. Yes, sir.

736 Q. 23. On your own account?

A. On my own account.

(Signature waived by consent of counsel.)

(It is stipulated and agreed by and between the counsel for the respective parties that the time for the taking of depositions in this case is extended until Saturday next, the 24th instant.)

(Here an adjournment is taken until Tuesday next, 20th instant, at two o'clock p. m.)

TUESDAY, *February* 20, 1877.

(On motion of counsel for defendant, further continued until to-morrow, at two o'clock p. m.)

WEDNESDAY, *February* 21, 1877.

(Further continued, on motion of counsel for defendants, until Friday, 23d instant, at two o'clock p. m.)

737 FRIDAY, *February* 23, 1877.

(Further continued, on motion of counsel for defendants, until Tuesday, 27th instant, at two o'clock p. m.)

TUESDAY, *February* 27, 1877.

Present: Messrs. Wilson and Hayes, of counsel for complainants; Mr. Botts, of counsel for defendants.

THOMAS BROWN recalled by Mr. WILSON:

(It is admitted that the stock of the Morgan Mining Company was not, at the commencement of this action, and is not now, for sale at any of the stock boards in San Francisco.)

Q. 24. Mr. Brown, do you know whether or not any of the shares of stock of the Morgan Mining Company are on the market in San Francisco, or have been before any of the stock boards of the city for sale?

738 A. Well, the stock of the Morgan Mining Company has never been on the stock boards here; and, so far as I know, for the last year or more I have not heard of any sales of it.

Q. 25. Would you say that it had any market value at the time of the commencement of this suit, or that it has at present?

A. I should say no; for the reason that it is a stock which is not

known outside of a few persons, and to make a sale of it you would have to find some particular man to sell it to. You could not go into the market and sell it.

Q. 26. Would not the estimate of any person of the value of the stock at the time of the commencement of this suit or now—depend upon the intrinsic value of the mine itself?

A. Entirely so.

Q. 27. You know of no other basis for arriving at the valuation?

739 A. No, sir.

Q. 28. Have any dividends ever been declared upon the shares of stock?

A. No, sir.

Q. 29. Has there been a series of assessment levied?

A. I have paid two assessments, I believe, of fifty cents a share each.

Q. 30. Is there an assessment now pending?

A. There is an assessment now pending of a dollar a share.

Re-cross-examination by Mr. BOTTS:

Q. 31. Have you known of any sales of stock of the Morgan Mining Company?

A. I can't say that I know of any sales of stock of the Morgan Mining Company. I have heard that there have been

740 some few shares sold. I don't know of my own knowledge of any sales.

Q. 32. You own how many shares of that stock?

A. I own twenty-one hundred and eighty-one shares.

Q. 33. They do not stand in your own name?

A. No, sir. There are one hundred and eighty-one shares standing in my own name and two thousand in the name of E. A. Richardson, trustee.

Q. 34. You have never sold any of your shares?

A. No; I never sold any. I gave a hundred shares away.

(Signature waived by consent.)

(It is admitted that the patent for the lands referred to in the complaint was issued to William Irvine, defendant, on the 9th day of March, 1874, and recorded in the office of the

741 county recorder of Calaveras county shortly after it was received, and before the commencement of this suit.)

Plaintiff rests.

742 TUESDAY, *June 5th*, 1877.

Present: Mr. Wilson, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendants.

(At the request of Mr. Botts, a continuance is taken until Monday, 18th inst., at eleven o'clock a. m.)

MONDAY, *June* 18, 1877.

Present: Mr. Botts and Mr. Garber, of counsel for defendants. (Mr. Wilson, counsel for plaintiff, being absent from the city, a further continuance is taken until Monday, 25th inst., at eleven o'clock a. m.)

Testimony for Defendants.

MONDAY, *June* 25, 1877.

Present: Mr. Wilson, of counsel for plaintiff; Messrs. Botts and Garber, of counsel for defendants.

743 *Deposition of T. K. Wilson.*

T. K. WILSON, having been heretofore sworn, is called as a witness on behalf of defendants.

Question 1. Mr. BOTTS: State your name, age, place of residence, and occupation.

Answer. Name, T. K. Wilson; age, forty years; place of residence, San Francisco; occupation, attorney-at-law.

Q. 2. How long have you been practicing law, Mr. Wilson?

A. I was admitted to the bar in 1863. I practiced some before that time.

Q. 3. How long have you been living in San Francisco?

A. Since 1870. I think I came here in December, 1869.

Q. 4. Are you a member of the law firm of Tilden & Wilson?

A. Yes, sir.

744 Q. 5. Have you been practicing law in the city of San Francisco since 1870, sir?

A. Yes, sir; and during the year 1870.

Q. 6. Do you know Mr. Richard H. Sinton?

A. I do.

Q. 7. How long have you known Mr. Sinton?

A. I think I first became acquainted with Mr. Sinton in 1870. I had met him once or twice before that time.

Q. 8. Do you know the property in Calaveras called the Morgan mine, or the Carson Hill mine?

A. I do.

Q. 9. When did you first know that property, Mr. Wilson?

A. Well, I knew it by reputation as early as 1861 or '2, when I first came to the State. I resided in Calaveras county from
745 that time until I came to San Francisco. I never visited the mine, however, until, I think, 1876, last year.

Q. 10. Did you not purchase this property known as the Morgan mine at a sheriff's sale in 1869, when it was sold for taxes?

A. Yes, sir, I did, or Mr. Irvine did; I don't exactly know which; I suppose I purchased it.

Q. 11. Did you receive then the certificate of purchase of the sheriff?

A. I received it; I am not positive whether the certificate was taken in my name or Mr. Irvine's; I think in Mr. Irvine's.

Q. 12. You bid at the sale, and the property was knocked off to you?

A. Yes, sir; I would like sooner or later to explain that.

Q. 13. You may explain.

746 A. I will state this: At the time of the sale I was the district attorney of Calaveras county, and I had made it a practice, where I thought the property was worth the amount of the judgment, to buy the property sold for taxes in that way, trusting that some one would take it off my hands; at the time this sale took place I bid in the property, and probably not five or ten minutes after that time I was notified by the sheriff that Mr. Irvine desired to bid in the property; I said "all right," then I bid that for Mr. Irvine, and I think I directed him to make the certificate out in Mr. Irvine's name; of that, however, I am not positive, but I think that is the case.

Q. 14. (Gives witness paper marked Defendant's "Exhibit A.") Will you look at that document?

A. (After examination.) Those are my signatures, and that is my writing.

Q. 15. When did you first render this account to Mr. Ir-

747 vine for the amount of money you had expended or advanced on account of the Morgan mine?

A. I think it was about the time of the date of that receipt; I could not be positive now; I think it was after the sheriff's deed was obtained; after I came to San Francisco; probably it might be a day or two before that time, or at the time the receipt is dated.

Q. 16. This is dated July 9, 1870?

A. It was about that time.

Q. 17. It was in July, 1870; yes, sir.

Q. 18. Did you ever, before that time, have any conversation with him concerning that amount? Did you ever state the amount to him before that?

748 A. I have no recollection of ever having stated it before that time. I don't think I was asked to. If I was asked to I did, but I have no recollection of being asked, or of stating it.

Q. 19. Will you look at Plaintiff's Exhibit No. 2, and say whether or not you recognize that paper?

A. (After examination.) I do.

Q. 20. When did you first see that paper, Mr. Wilson?

A. I first saw this paper the day before William Irvine left for the East, in 1874; I presume the day that this bears date, but of that I am not positive; it was the day, however, before Mr. Irvine went East.

Q. 21. Will you state the circumstances under which you first saw that paper?

A. I was in my office, and had, I think, three gentlemen

749 with me; my office at that time consisted of two rooms, and

I was in the main room, and three gentlemen were with me, and Mr. Irvine and Mr. Sinton came in; I noticed that they were in a hurry, from their appearance, as I was myself, and I arose from the table and advanced to meet them, and took them into the small room which was usually occupied by Mr. Tilden when he was in the office. They then told me—Mr. Irvine, I think, took the paper out of his pocket and said "Mr. Sinton says I should sign this." I took it up and started to read it, and made this remark, in substance, as near as I can recollect: "What is it all about, any way?" And then they said—I think Mr. Irvine—this was to be signed and left with me, to be delivered to Mr. Sinton in case he (Irvine) died upon his passage—or, at least, in case he never returned; if he did return, it was to be returned to him. I made the re-
750 mark, "that it doesn't make any difference any way what it is.

Q. 22. What did Mr. Sinton say when Mr. Irvine made that statement, did he assent or dissent?

A. He did not dissent; I could not say what he did say, but I took it for assent, of course. Upon that condition the paper was signed. Mr. Irvine signed it, and I signed it as a witness; and Mr. Tilden coming in then, we got him to also witness it. That is my recollection of it, as nearly as possible.

Q. 23. What was then done with the paper?

A. I then took it and put it in my safe, and they left. I retained it until some time about the commencement of the trial of this case, when I brought it here and gave it to yourself or Mr. Garber.

Q. 24. Did either Mr. Irvine or Mr. Sinton ever apply to you for that paper?

751 A. Mr. Sinton applied for a copy of it, and Mr. Irvine applied for the paper itself, probably two or three days, or a week, subsequent to his return from the East; I could not fix the date; I went to my safe then for the paper.

Q. 25. Upon the application of Mr. Irvine?

A. Upon the application of Mr. Irvine to give it to him. I had a great many papers there, and was unable at that moment to place my hand upon it. I told him, however, that I would look it up and hand it to him; that it would make no difference, as it was merely delivered to me in escrow, anyway. That was before there was any litigation that I was aware of in regard to it. I don't know whether he applied for it again after this litigation commenced or not. If he had I should not have given it to him. At that time, however, I should have given it to him if I had found the paper, as I supposed him entitled to it.

752 Q. 26. Do you remember about the time when Mr. Irvine returned from the East?

A. My recollection is that it was in July of 1874.

Q. 27. This paper (Exhibit No. 2) is dated the 28th day of March, 1874?

A. That was before he left. I think that was the day before he

left; at least the paper was executed the day before he left, and my recollection is that he returned some time during the middle or latter part of July, and about a week or three or four days after that he came in for this paper.

Q. 28. At the time that Exhibit No. 2 was signed and deposited with you, Mr. Irvine and Mr. Sinton being present, when Mr. Irvine made some objection to signing the paper, did you advise him that if that paper were a statement of the facts it was a reason-
753 able demand on Mr. Sinton's part, as he was going away, and tell him that there could be no impropriety in his executing the paper?

A. I did not, because I did not read the paper, and my opinion was not asked, except in this one regard, and that was whether the paper would have any effect or not if delivered; Mr. Irvine stated that he was perfectly willing that the paper should be delivered if he died, or did not live to return, and I simply said to him then that it made no difference what the paper contained; that it would have no effect if not delivered.

Q. 29. Did you on that occasion, Mr. Wilson, read that paper aloud?

A. I did not read it at all; we were all in too much of a hurry, and my opinion was not asked, and therefore I had no occasion to read it.

754 Q. 30. Did you on that occasion propound to Mr. Irvine the question, "Is this a statement of the facts?"

A. I have already answered that; I did not, because I have given you the conversation that took place there; I will further add, I never read that paper until about a week afterwards.

Q. 31. In Mr. Sinton's testimony, taken in that case, he says that on this occasion "Mr. Wilson having read the paper aloud in our presence, propounded the question to Mr. Irvine, 'Is this a statement of the facts?' An affirmative reply was made by Mr. Irvine, and Mr. Wilson said to him, 'There is no reason, then, why you should not sign this paper and leave it in my possession; that it being true, Mr. Sinton can compel you in a court of equity to make this account, or to account for this interest;" did that occur, sir, on that occasion, or anything like it?

755 A. It did not; Mr. Sinton must be entiely mistaken in regard to that; nothing of the kind occurred.

Q. 32. Do you recollect what occurred, Mr. Wilson, when Mr. Sinton came to you and procured a copy of this Exhibit No. 2, what conversation, if any, took place between you and him?

A. No; I do not. The substance of it was, Mr. Sinton said he would like a copy. I told him that there was no objection to his taking a copy; of course he could not have the original. I don't know whether I told him that or not. I don't know as he made an application for it; but I told him that there was no objection to his having a copy.

Q. 33. Did you ever hear Mr. Sinton say anything about the interest he had or held in this Morgan mine?

A. I could not say that I ever did. I simply have my own impressions; but whether I gathered them from Mr. Sinton or
756 Mr. Irvine, or from the conversations with both of them, I could not say.

Q. 34. Did you have any conversation with Mr. Sinton upon the subject of the Morgan mine?

A. Oh, yes; a great many times. I could not say how many. I presume probably a hundred times or more.

Q. 35. In those conversations was anything said about Mr. Sinton's interest in the mine?

A. I can merely give you the impressions which I received from those conversations, and also from conversations with Mr. Irvine.

Q. 36. Tell me what those impressions were.

Mr. WILSON: I object to his stating anything other than the conversations with Mr. Sinton, either in word or in substance.

Q. 37. Mr. BOTTS: Have you any strong impression of the
757 result of any conversation that you had with Mr. Sinton concerning his interest in the Morgan mine?

(Question objected to and withdrawn.)

Q. 38. Do you recollect having any conversation with Mr. Sinton at all, in which reference was made to his interest in the Morgan mine?

A. I could not specify any particular conversation that I ever had with him; I met him, I suppose, a hundred times, in reference to that mine.

Q. 39. And you do not know whether or not in those conversations anything was said concerning his interest?

A. I do not; I know that I acquired a very strong impression, either from him or Mr. Irvine, or both, but I could not say directly from Mr. Sinton himself.

758 Q. 40. Do you recollect the suit instituted by James G. Fair against William Irvine, an action in ejectment, I think, in 1870, for the recovery of the possession of this property?

A. I recollect a suit; I think it was in 1870.

Q. 41. Did you appear in that suit?

A. I appeared for Mr. Irvine.

Q. 42. As attorney for Mr. Irvine?

A. Yes, sir.

Q. 43. Did you ever know anything about that being an agreed case?

A. There was no agreed case that I was aware of, except in this: I met Mr. Barber, and said to him that my understanding of the case was that there were but two or three points—I don't remember now which—involved; we had practiced with Mr. Barber in the country, and we had been in the habit, in a case of that kind,

759 of agreeing upon the issues that were involved, and I proposed that we do that in this case; he agreed with me that there were but three questions involved in this suit, and we agreed upon everything else.

Q. 44. Was there any understanding that you ever knew of between the parties to that suit, or between the attorneys, that any certain result should be attained?

A. There was not between the attorneys, and none between the parties, that I was aware of.

Q. 45. It was not, then, arranged and agreed that Mr. Irvine was to succeed in that suit?

A. Not between the attorneys, it was not; and I was not aware that it was between the parties.

760 Cross-examination by Mr. WILSON:

Q. 46. The suit last referred to, Fair *vs.* Irvine, was commenced in what court?

A. In the fourth district court, of this city, I think—I am very certain.

Q. 47. It was subsequently appealed to the Supreme Court?

A. Yes, sir.

Q. 48. It was argued in the Supreme Court, and judgment rendered?

A. Yes, sir; argued, so far as I was concerned, orally. I don't recollect, but I think it was submitted by the other side.

Q. 49. Did that involve the question of the tax title referred to by you?

A. Yes, sir.

761 Q. 50. Whose attorney were you in that case?

A. Mr. Irvine's.

Q. 51. Who was Mr. Fair's attorney?

A. H. P. Barber; now dead.

Q. 52. Did you have some consultations with Mr. Sinton concerning that suit, during its pendency in either court?

A. Well, very frequently, indeed; that is, Mr. Sinton used to meet me frequently in the office, and ask me how the matter was getting along.

Q. 53. In your office?

A. In my office; yes, sir; and on the street, and in other places.

Q. 54. Did Mr. Sinton take an interest at that time in the success of Mr. Irvine in that suit?

A. He seemed to.

762 Q. 55. Do you remember, after that suit was appealed to the Supreme Court, or about the time of the appeal, or when it was pending in the Supreme Court, that you came to me, S. M. Wilson, in reference to my assisting in the argument of the case in the Supreme Court, and bringing a printed transcript, such as are filed in the Supreme Court in those cases?

A. I really have no recollection of that, Mr. Wilson, at all; it is quite likely I did, but I have not the slightest recollection of it.

Q. 56. Don't you remember of discussing with me the points upon which you relied, giving me your opinion, and asking me mine, upon whether or not the tax title could be maintained in the Supreme Court?

763 A. I shall have to answer that in the same way; I have not the slightest recollection in the world of it; I might have done so; I presume I did, of course, if you say so, but I have not the slightest recollection of calling upon you in reference to that at all.

Q. 57. Do you not remember that your acquaintance with me arose under the circumstances that I have represented, and that you were introduced to me by Mr. R. H. Sinton, and for the purpose which I have now indicated?

A. I shall have to answer that in the same way: that I have not the slightest recollection of calling at your office. I don't say that I did not. I simply say that somehow I have not the slightest recollection of it in the world.

Q. 58. Have you now no recollection whatever of having been brought in contact with myself as an attorney representing Mr.

764 Sinton and others that he was acting for in reference to this tax title, in order that I might co-operate with you in establishing the validity of that tax title in the Supreme Court, and by a decision of the Supreme Court?

A. I must say that I do not. On the contrary, if you will allow me to give my impression, it is, that both you and Judge Heydenfeldt had given an opinion adverse to the tax title, but whether before that time or not I don't know.

Q. 59. Do you not recollect, on reflection, that such an interview took place between us at my office, 420 California street, second story, being at the corner of California and Lidesdorff streets, in the room in which I keep my law library, and that the subject was spoken of between us at more than one interview, and that a printed transcript was commented upon, and its contents explained by you to me.

765 A. I shall have to answer that as I have before, that at present I have no recollection of it; at the same time it probably all took place. I have not thought of it, and at present I have not the slightest recollection of it at all—of having an interview with any one except Mr. Barber.

Q. 60. Mr. Henry P. Barber, who is now dead?

A. Yes, sir.

Q. 61. Do you recollect about the date of his death?

A. No; I do not; it was some time after that, though.

Q. 62. After the judgment was rendered?

A. Some time after the judgment was affirmed in the Supreme Court; but I could not tell you the date.

Q. 63. Mr. Barber had been an attorney of Tuolumne county for-

merly, of which county you had also been a practicing attorney?

766 A. Yes, sir; I had practiced there some; I was residing in Calaveras county, and Mr. Barber had a great deal of practice in Calaveras county; that is where I met him.

Q. 64. Did you not know, pending that litigation, that Mr. Barber, whilst carrying on the form of prosecuting this suit, was really desirous that a decision should be rendered by the Supreme Court which would establish the validity of that tax title?

A. I did not. I consider Mr. Barber presented the only points there were in the case, under the former decisions of the Supreme Court in regard to tax titles procured by decree of foreclosure.

Q. 65. Did not the agreed case or the agreed points between you and Mr. Barber present simply the naked legal questions to the Supreme Court, whether the proceedings resulting on that tax title were regular and in accordance with law, so as to pass the title to the purchaser?

767 A. Those were principally the points. I think there were three. One was in regard to the purchase and payment of the purchase price and the amendment by the district court of their record, and the question arose as to whether they could go behind the return of the sheriff or not. I think those were all of the points.

Q. 66. All of these centered in the one proposition as to whether the party holding the sheriff's deed on the sale for delinquent taxes had received the legal title?

A. Yes, sir; I so understood it.

Q. 67. Do you remember the date of the commencement of that action by Mr. Fair against Mr. Irvine?

A. I do not. The sale was in December, and immediately upon expiration of the six months Mr. Irvine received a sheriff's deed; and Mr. Fair was then in possession of the mine through

768 his agents. They declined to give possession to Mr. Irvine, and I applied for a writ of assistance to the eleventh district court, to place Mr. Irvine in possession, I think immediately after that. I think that must have been in July or August of 1870 that the suit was commenced. I would not be positive of the date without looking at my book. I think it was soon after he was placed in possession.

Q. 68. Are you and Mr. Tilden in partnership in the practice of the law?

A. We are.

Q. 69. And have been during all the period——

A. From 1870 down, and during the year 1870.

Q. 70. Are you one of the stockholders in the present company, the corporation defendant here?

A. Yes; if the corporation is a defendant, I am.

769 Q. 71. How many shares of the stock do you hold?

A. Twenty-six, I think.

Q. 72. How long have you been a stockholder?

A. Well, I think, soon after the corporation was formed I became a stockholder. I don't remember the date exactly.

Q. 73. Were you one of the original incorporators who formed the corporation?

A. No, sir; I was not.

Q. 74. Did you derive your stock by transfer?

A. Yes, sir.

Q. 75. From whom did you derive it?

A. That I could not tell to save my life; that is, from whom it was transferred.

Q. 76. I don't mean that. From whom did you derive it?

770 A. I received it either from Mr. Irvine or James H. Wallace. I am not certain which, but where it was procured I don't know.

Q. 77. Was it not, or the greater part of it, obtained directly by you by a negotiation with Mr. Irvine, defendant?

A. No; I have only twenty-six shares of the stock, any way. I have an account with Mr. Irvine, and have had for some time, and I expect to credit Mr. Irvine with the amount of the stock upon a settlement.

Q. 78. At what rate per share do you intend to credit him with it?

A. We never have had any settlement yet. Whatever the market price is, I suppose.

Q. 79. How did you happen to become a stockholder—under what circumstances?

771 A. I don't know. I have been solicited to purchase stock in the mine a great many [times] on the representation that it was a valuable mine; but I never had the opinion that many had in regard to it, and always declined. I was requested then to take a sufficient number of shares to entitle me to become a director, and I consented to; but I never have taken anything more.

Q. 80. Requested by whom?

A. I think by Mr. Irvine or Mr. Wallace.

Q. 81. Were you the attorney of the corporation defendant at any time?

A. Yes, sir.

Q. 82. Are you now its general attorney?

A. I am one of them—no; I don't know as I am a general attorney; I am so far as two suits are concerned, only.

Q. 83. Are you one of the present trustees or directors?

A. I am.

772 Q. 84. When did you become such?

A. In 1876, I think the first time; I was first elected to fill a vacancy; I think it was 1876; it might be 1875, possibly.

Q. 85. Were you not Mr. Irvine's attorney from about the time

of the purchase by you of the tax title down to the organization of the corporation?

A. In regard to this property I was; but not his general attorney.

Q. 86. Who introduced you to Mr. Sinton, and what was the occasion of your first acquaintance with him?

A. I could not tell you; I think I met Mr. Sinton first in 1863 or '4, when I was taking some depositions in regard to this very property in a suit that was pending here; met him at Mokelumne Hill; my impression is, that I was introduced to him by Judge Brockway.

773 Q. 87. You said in your examination-in-chief that you knew him first in 1870, although you had met him before?

A. Yes, sir; I met him; I think that was the first and only time until I met him in 1870.

Q. 88. In 1870, what business brought you in contact with Mr. Sinton?

A. I don't know, unless it was in connection with this mine; the only business we had was Mr. Sinton was an intimate friend of Mr. Gatewood's, now of San Diego, as I was myself, and my impression is that I first met Mr. Sinton in 1870 with Mr. Gatewood, in merely social conversation, and afterwards I met him several times in connection with this property; I could not tell you who introduced him to me in 1870; whether Mr. Gatewood or Mr. Irvine, or some one else.

774 Q. 89. During the numerous interviews that you have referred to between yourself and Mr. Sinton in reference to this mine, was not Mr. Irvine frequently present?

A. I think it quite likely that he was; I could not say that he was present at any time.

Q. 90. Do you mean to say that you have no recollection of Mr. Irvine and Mr. Sinton being present at your office, or with you on business in connection with this mine?

A. I would not like to say that he was; my impression is that he was there, but I would not like to state that he was ever there with Mr. Sinton.

Q. 91. Did you ever have any interviews with Mr. Fair in reference to this property?

A. The only interview that I had in reference to this property with him was one time when I met Mr. Fair casually on the street; that was after the Fair suit was decided.

775 Q. 92. Prior to the termination of that suit have you no recollection of any interview with him?

A. No; I am pretty certain I never did.

Q. 93. Did you, before the termination of that suit, have any interview at any time with A. A. Selover in reference to this property?

A. I never met Mr. Selover in my life, that I am aware of. I would not know him if I should see him.

Q. 94. With whom did you visit the mine in 1876?

A. The first time, I think, with the co-directors, Judge Botts, Mr. Maguire, Mr. Wallace, and Mr. Dixon.

Q. 95. With whom did you visit it subsequently?

A. Subsequently I went up with Mr. Irvine to take some depositions after the suits were commenced.

776 Q. 96. To what suits do you refer?

A. I refer to the suit of Bacon *vs.* The Morgan Mine, and John A. Tranor *vs.* The Morgan Mine.

Q. 97. The suits now pending?

A. Both of them are now pending, I think. The Bacon suits we took depositions in.

Q. 98. Did not Mr. Irvine, during the time of the interviews, which you stated you had from time to time with Mr. Sinton, refer you to Mr. Sinton for information on the various matters connected with the mine?

A. No, sir; I always went to Mr. Irvine on matters in relation to the mine. I never was referred to any party that I am aware of.

Q. 99. Did you not obtain from Mr. Sinton, as the attorney for the mine, information concerning the same?

778 A. I have no recollection of it at all. I might. As I said before, I had various interviews with Mr. Sinton.

Q. 100. What was the purport and object of those interviews with Mr. Sinton?

A. I shall have to give you my understanding at that time. My understanding is this: The object was to sell the mine; and, if the mine was sold, I understood that Mr. Sinton was acting as a sort of broker, and that he would receive upon the sale a large commission, or amount, as you choose to call it.

Q. 101. Mr. GARBER: What time was this?

A. That was down to the time when a deed was made from Mr. Sinton to General Ihrie. From the commencement of all these proceedings down to that time, I had been led to suppose that Mr. Sinton was acting as a sort of a broker, and that if the mine was sold, he would receive quite an amount of money; at that

779 time, however, I became under the impression that I had been misled by both parties, and that he had had some interest in it from the commencement.

Q. 102. Mr. WILSON: From whom did you get the understanding or impression to which you have just referred?

A. From seeing an executed deed to Ihrie, or knowing that he did execute one.

Q. 103. Had you not the impression to which you have referred, that Mr. Sinton had an interest in the mine with Mr. Irvine, prior to the time of the execution of the deed from Sinton to Ihrie?

A. Well, it was along about that time; I could not fix the date; as I stated, it was an impression that I had.

Q. 104. Did you draw the deed from Sinton to Ihrie?

A. I did not.

Q. 105. How did you learn of it?

780 A. I learned from Mr. Sinton, and I am not certain but what Mr. Sinton—I am under the impression that Mr. Sinton drew the deed in my office.

Q. 106. Did he not, at the time he drew that deed, have presented to him, in order to obtain a description from it, the paper Exhibit No. 2, to which you have referred?

A. He procured a copy of that paper, I think, about that time. I would not say that it was exactly at that time—made a copy of it, I think, himself, or I had one made for him.

Q. 107. Mr. Wilson, at the time of the occurrence which you have referred to, at which the paper marked Exhibit No. 2 was executed, were you the attorney of Mr. Irvine?

A. Yes, sir; I was the attorney for the property, and had been his attorney as far as that property was concerned, and that was all.

781 Q. 108. Was not the object of the parties in coming to you at that time with that paper to get your advice as a lawyer on the subject?

A. I really don't know what their object was. The question asked me was whether or not the paper would have any effect unless it was delivered. I told them it would not; until delivered, it would have no effect whatever.

Q. 109. Did they not explain to you at the time the contents and purport of that paper?

A. No, sir.

Q. 110. Are you sure at this period of time, seven years after the date of that document, that you may not have forgotten some portion of that conversation?

A. I do not think I have—from this fact that I had a curi-

782 osity to know what that paper contained, and some few days afterwards, as quick as I could get time—I was very busy at that time—I went to my safe and took that paper out and read it to see what there was in it. At that time, as I stated before, they were in a very great hurry, and I was, and I was given to understand that the paper was left to be delivered under certain conditions; and, therefore, my view of it was it made no difference what the paper contained. And I did not really know what the paper contained until three or four days afterwards.

Q. 111. Are you sure that they did not state to you in substance, and briefly, what it was?

A. Yes, sir; I am quite sure of it.

Q. 112. You would not undertake to say at this time that they did not state to you in substance what it was?

A. I am very positive that they did not.

783 Q. 113. Did you swear to that as a fact, or do you simply give your recollection of what occurred?

A. I give that as my recollection of what occurred.

Q. 114. You do not undertake to swear that no other things occurred at that time?

A. I do not remember, but I have no idea that there did.

Q. 115. I am asking you whether you swear positively that nothing else, except what you have related, did occur, or whether you are giving your recollections of what did occur?

A. I am giving my recollection of what did occur, and, from the circumstances surrounding it, I am very certain that I am not mistaken.

Q. 116. Might you not have asked the parties at that time whether the statements contained in that paper were correct or not?

784 A. I know I did not; I simply asked them what it was all about, and they told me it was to be delivered in case he did not return.

Q. 117. When you asked them what the paper was about, who replied, and what was the reply?

A. I think Mr. Irvine replied; the reply was in substance that it was to be—I could not tell exactly what he said, but the effect was that the paper was to be delivered and handed over to Mr. Sinton in case he died; I then said to him that it made no difference what the paper contained.

Q. 118. Mr. Wilson, did you not regard it as a singular circumstance that these two gentlemen, you being Mr. Irvine's legal adviser in regard to this mine, that he should not have consulted you with regard to the paper, and as to what its legal effect and purport was?

785 A. Well, yes; I thought it was, because when I looked at the paper afterwards and examined it, I knew I never should have advised Mr. Irvine or any one else to have signed such a paper, even leaving it in escrow, if I had known what it was.

Q. 119. Why would you not have advised him to sign it if the facts therein stated were true?

A. If the facts were true I don't suppose there would have been any harm in it.

Q. 120. If the facts therein stated were correct, it was a proper paper for him to sign?

A. I don't know why not.

Q. 121. Might you not have told the parties that very thing at the time, and now have forgotten it?

A. No; I did not, because I did not know what the paper contained.

Q. 122. You read a portion of this paper, as you said in your examination-in-chief?

786 A. I took it up for the purpose, I think I said, of reading it; I should have said so.

Q. 123. Do you now recede from your statement made upon your examination-in-chief that you read a portion of it?

A. I do not think I read a particle of it; I took it up something

as you have it now, for the purpose of reading it, and asked them what it was all about.

Q. 124. The whole paper covers but one side of one sheet of legal cap, does it not?

A. I think so.

Q. 125. You had then been an attorney-at-law in practice for some years?

A. Yes, sir.

Q. 126. Do you hold yourself perfectly competent to give the legal effect of a paper of that kind, without some consideration?

787 A. I have a very poor opinion of my abilities; I don't know that I could at that time, and don't know that I could now.

Q. 127. You represented to Mr. Irvine at the time when he employed you as his attorney that you had sufficient legal skill to transact his business?

A. No, sir; I made no such representations.

Q. 128. Did you hold yourself out as a lawyer of sufficient ability to transact his business?

A. No, sir; I never held myself out to a client as having sufficient ability to transact his business.

Q. 129. But did you not undertake his business on the basis that you were competent to attend to it?

A. I undertook his business, and he paid me for it; as to my being competent to attend to his business, he must judge of that for himself.

Q. 130. At that time you had been district attorney for Calaveras county?

788 A. Yes, sir.

Q. 131. And had been practicing law some years?

A. Yes, sir.

Q. 132. Did you think, at the time of the signing of this paper, that you were competent of judging as to its legal effect without examination into the subject?

A. Yes, sir; I think I would have been competent to say what I thought to be its legal effect; but my opinion might have differed from that of other attorneys; probably I might have been right, and I might have been wrong.

Q. 133. Can you state, at this time, the words which were used by yourself and Mr. Sinton and Mr. Irvine during that interview?

A. I could not, sir, except, I think, I made this inquiry:

789 "What is all this about?" And they said the paper was to be left, as I stated before. The interview occupied not over one or two minutes, I think. There were parties in the other room waiting, and these people were in a hurry, and the paper was to be left under those conditions, and therefore there was no consultation in regard to it. I think they were standing all the time; I don't think they sat down even for an instant.

Q. 134. In whose handwriting is this paper, Exhibit No. 2; the body of it?

A. I don't know, sir; it is not mine.

Q. 135. Do you think you ever saw that handwriting before?

A. (After examining Exhibit No. 2.) The handwriting is almost exactly like the handwriting of J. G. Severance, who was connected with me for years.

Q. 136. Was that written in your office?

790 A. No, sir; it was not. They had the paper when they came in.

Q. 137. Who handed the paper to you?

A. I think Mr. Irvine.

Q. 138. What did he say when he handed it to you?

A. He said in substance that there was a paper that Mr. Sinton wanted him to sign and leave with me. I could not give the words exactly that were used at that time.

Q. 139. Who spoke next, and what did he say?

A. Well, I really could not tell you who spoke next.

Q. 140. What else was said in substance by any party?

A. It was said in substance that it was to be delivered to me, to be retained by me until Mr. Irvine's return. If he died while absent, then I was to deliver it to Mr. Sinton; otherwise, to

791 give it to Mr. Irvine. That was the substance of it, as I understood it at that time.

Q. 141. Prior to that time you never learned from either of these parties, or at the time you never learned from either of these parties, anything further in connection with this paper than what you have stated?

A. No, sir; I never heard of it before that.

Q. 142. Afterwards, when you read it by yourself, you found that it contained a recital of certain facts on its face?

A. Yes, sir; the paper speaks for itself.

Q. 143. During Mr. Irvine's absence in the East you read the paper?

A. Yes, sir; I think some three or four days, or a week after his departure?

Q. 144. How long was he absent?

A. I think he returned in July some time—the succeeding July. I am not positive.

792 Q. 145. He was gone a month or six weeks, was he?

A. I think in July he returned; I think he was gone three or four months.

Q. 146. Did he not go to Europe, as you learned from him afterwards?

A. I think he did; I am under the impression he did.

Q. 147. Was any person here during his absence left in charge of his business in connection with this mine or mining property, who communicated with you in regard to that business?

A. No; I think I had nothing to do in connection with that

property while he was away; I think there were no suits pending, and do not recollect that I had anything to do with it at all during his absence.

Q. 148. Did you meet Mr. Sinton at any time during his absence?

793 A. Oh, yes, sir.

Q. 149. You had conversation with him on the subject of the mine during Mr. Irvine's absence?

A. Yes, sir; I recollect Mr. Sinton being in the office once positively.

Q. 150. During Mr. Irvine's absence?

A. Yes, sir.

Q. 151. On what business?

A. I don't know whether it was during Mr. Irvine's absence in the East, or during his absence from the city afterwards; I don't know whether it was while he was absent in Europe or absent from the city subsequent to that time; he was in to get a copy of that paper, but I would not fix the date now when it was.

Q. 152. Did you not regard him then as a half owner of that mine after the execution of that paper?

794 A. No; I certainly did not.

Q. 153. Did you not treat him as such afterwards?

A. I treated him as such from about the time of the execution of the deed to Ihrie. I then was under the impression that he might have had a secret interest from the commencement.

Q. 154. What created that impression in your mind, that he might have had a secret interest from the beginning?

A. I think it was his transfer of the property in connection with this paper (Exhibit No. 27)—taking the two together.

Q. 155. Nothing else?

A. I could not say whether there was anything else or not.

Q. 156. Did not his frequent communication with you and interviews with you prior to that time, and the statements of

795 Mr. Irvine to you, have some effect in producing that impression?

A. I presume that his interviews did, although up to that time I had the impression that he was acting in the same manner as many brokers here in the city act.

Q. 157. That subject of disposing of the mine to some organization was referred to by Mr. Irvine and himself from time to time, was it not?

A. I presume so; I think so. It was my impression all the time that the property was to be sold.

Q. 158. Mr. Wilson, you look upon the papers here produced from the district court of the third judicial district of the city and county of San Francisco, being case number 1004—the suit of H. J. Tilden and T. K. Wilson *vs.* Richard H. Sinton and William Irvine, defendants—and state whether or not you are the Wilson

therein named, and whether or not the Tilden therein named was your partner?

796 A. Yes, sir.

Q. 159. Will you look at the complaint in that cause, and also at the verification at the foot of the complaint, and state whether or not that is your signature, and whether you verified that complaint at that time?

A. (After examination.) That is my signature, and I presume I verified the complaint at that time; I have no recollection of it.

Q. 160. Have you any doubt that you verified it?

A. I have no doubt at all, sir; none whatever, but I have no recollection of it.

Q. 161. Also, look at (in the same case) the affidavit for an attachment, and state whose signature that is at the foot of that paper?

A. (After examination.) That is my signature.

797 Q. 162. Look at the writ of attachment issued in that case, and the sheriff's return, also in connection with the same, and state whether or not you gave the sheriff of Calaeras county directions to levy that attachment.

A. I presume I did. Of course I do not recollect the fact, but I presume so.

Q. 163. Have you any doubt of it?

A. No; I have no doubt but what the directions came from the firm.

Q. 164. Don't you remember of writing yourself to the sheriff to give him directions on this subject?

A. I do not; but it is quite likely that I did.

Q. 165. Do you preserve the copies of letters on business matters written by your firm?

A. No; not at that time. We did not preserve copies then, unless the letters were important. We have for the past two years preserved copies of nearly all our letters.

798 Q. 166. If you have, you have copies of letters of instruction to the sherif concerning the levying of this attachment; will you produce the same?

A. I know that we have not.

Q. 167. Do you not remember the fact that that property was attached in this suit?

A. I have no doubt of its being attached.

Q. 168. Please look upon the stipulation also from the same papers, filed April 17th, 1875, signed "Tilden and Wilson," and state in whose handwriting the body of the paper and the signature are.

A. (After examination.) It is in my handwriting—stipulation dismissing the attachment.

(Plaintiff's counsel here offers in evidence the papers last above referred to, being the complaint, affidavit for attachment, writ of

799 attachment, and sheriff's return in the cause of Tilden and Wilson *vs.* Sinton and Irvine, in the third judicial district

court, No. 1004, certified copies of said papers are produced and filed herewith, marked Exhibit No. 22.)

Q. 169. Will you look upon a copy of the summons in the same case now presented to you with a stipulation of the date of October 5, 1874, endorsed on the back of it, and state in whose handwriting the signature "Tilden and Wilson" to that stipulation is.

A. The signature is mine. The stipulation I don't know in whose handwriting it is.

Q. 170. Do you know who was the attorney for the defendants in that case?

A. William Hayes, I think, appeared for them; I am very certain he did.

Q. 171. How was that suit settled?

A. Well, it never has been settled. I will tell you the rea-
800 son why the attachment was dismissed.

Q. 172. Is the action still pending?

A. Yes, sir.

Q. 173. This complaint sets forth that defendants therein, Sinton and Irvine, are indebted to the plaintiffs, Tilden and Wilson, in the sum of ten thousand dollars, upon the balance of an account for the services of the plaintiffs, as the attorneys of the defendants, rendered upon their retainer, between the 29th of October, 1870, and the 1st of September, 1874, in defending certain suits, and for like services, at their request; for drawing, copying, and engrossing various instruments in writing, and in counselling and advising them, the defendants, and for divers journeys, and other attendances in and about the business of the defendants, at their request, in and about said suit and business. What suits were referred to in this complaint?

801 A. It must have referred to the suit of Fair and the suit of Addison, and there was another suit; I don't recollect what we did in that, if anything; it was a suit of Hays, and some one else, I think.

Q. 174. Was the suit of Fair that you have referred to the suit heretofore referred to in your testimony concerning the tax title?

A. Yes, sir.

Q. 175. What was the suit of Addison; who were the plaintiffs and defendants?

A. Addison, Calhoun Benham, Coffee, I think, and quite a number of other parties were plaintiffs, and the defendant was William Irvine—I think the sole defendant.

Q. 176. In what court was that suit pending?

A. The fourth district court.

Q. 177. Was that brought for the recovery of the mine?

A. Yes, sir.

802 Q. 178. Was that an action of ejectment?

A. Yes, sir.

Q. 179. What instruments are those referred to in this complaint

pressions derived from the statements and conduct of Mr. Sinton. I think Mr. Irvine was in the country at that time.

Q. 195. Do you know who made out the papers for the patent that was obtained by Mr. Irvine to the Morgan mine?

A. I only know what I told Mr. Irvine to do.

Q. 196. Did you make out the papers?

A. No, sir; I did not.

809 Q. 197. Mr. WILSON: At the time of the execution of the declaration of trust, Exhibit No. 2, did you make any memorandum at all on the subject for your own direction?

A. I did not; and it is about the only case of the kind in my life where I did not. We were in such a hurry that I neglected to do it.

T. K. WILSON.

Here a continuance is taken until Wednesday, 27th instant, at eleven o'clock a. m.

WEDNESDAY, *June* 27, 1877.

At the request of Judge Botts a further continuance is taken until to-morrow, 28th instant, at eleven o'clock a. m.

810 *Deposition of Mr. Irvine.*

THURSDAY, *June 28th*, 1877.

Present: Messrs. Wilson and Hayes of counsel for complainant; Mr. Botts of counsel for defendant.

Examination-in-chief of WILLIAM IRVINE by MR. BOTTS:

Q. 1. You are the defendant in this action, Mr. Irvine?

A. Yes, sir.

Q. 2. How old are you, Mr. Irvine?

A. Forty-seven.

Q. 3. How long have you been living in California?

A. Since August, 1850.

Q. 4. Where were you living in 1850 and 1851; in what part of California?

A. Close to Carson's, in Calaveras county.

811 Q. 5. Did you at that time know anything of the mine that is commonly called the Morgan mine?

A. Yes, sir.

Q. 6. Was there anything peculiar or particular about that mine in the way of the development of ores?

A. There was a large amount of very rich rock taken out of it in the fall of 1851.

Q. 7. Did you know anything about that?

A. Yes, sir; I was there personally, and saw it.

Q. 8. Do you know Mr. Richard H. Sinton?

A. Yes, sir.

Q. 9. When and where did you first become acquainted with Mr. Sinton?

A. I first saw Mr. Sinton at Mokelumne Hill, quite a number of years ago; I could not tell how many.

Q. 10. I do not ask you when you first saw him; when
812 did you first become acquainted with him?

A. I became acquainted with him in the fall of 1869.

Q. 11. Under what circumstances?

A. Jefferson Gatewood introduced me to him.

Q. 12. Where?

A. In San Francisco.

Q. 13. In what part of San Francisco?

A. It was on California and Montgomery—about the crossing of California and Montgomery street.

Q. 14. Will you state what passed between yourself, Mr. Gatewood, and Mr. Sinton on that occasion?

A. I can only give you the purport.

Q. 15. State what passed as near as you can remember it, and if you detail any conversation give as nearly as you can the
813 words of that conversation; if you cannot give the words, give the purport of it.

A. Mr. Gatewood and myself were walking up the street and met Mr. Sinton at the place designated, and we there were introduced to each other; Mr. Sinton questioned me as to where I had been living, and I told him in Calaveras; I then told him that I had seen him there years ago, and also that I had been present when he was in court there, or attending to some legal matters in regard to this Morgan mine; Mr. Gatewood then made the remark that the Morgan mine was going to be sold for taxes, and, says he, "you had better buy it, Irvine." That was the purport of the conversation.

Q. 16. Do you recollect Mr. Sinton saying anything in relation to the purchase of the mine?

A. No, sir; Mr. Sinton did not say anything about the purchase of the mine; it was Mr. Gatewood suggested it.

Q. 17. Was that all that passed at that conversation with respect to the Morgan mine?

A. That was about all that passed.

814 Q. 18. Had you known Mr. Gatewood before?

A. Yes, sir; for a great number of years.

Q. 19. Where had you known him?

A. In Calaveras county, where he was at one time district attorney.

Q. 20. He had been district attorney of Calaveras county?

A. Yes, sir.

Q. 21. Did your acquaintance with Mr. Sinton continue after that introduction? Did you have opportunities of seeing him and meeting with him afterwards?

A. Yes, sir; I meet with him frequently on the street, and we recognized each other.

Q. 22. When did you have any conversation with Mr. Sinton afterwards concerning the Morgan mine, if you had any?

A. The first conversation we had was about the month of
815 July, 1870, at my store, in Front street.

Q. 23. Didn't you have some conversation with him before that?

A. Nothing to amount to anything.

Q. 24. Had you a conversation with him previous to that, concerning a letter that you received from Mr. Thorn?

A. That was merely showing him a letter that I had received from Mr. Thorn, informing me that I had not bought the property.

Q. 25. Have you got that letter?

A. Yes, sir. (Produces letter.)

(The said letter, which bears date January 10, 1870, and is signed B. K. Thorn, is offered in evidence by defendant, marked Defendant's Exhibit "B."

Q. 26. Mr. Irvine, what Barber is this that Mr. Thorn refers to in this letter?

A. Henry P. Barber.

816 Q. 27. Did you know Mr. Barber?

A. Yes, sir.

Q. 28. Mr. Barber was a lawyer, was he not?

A. Yes, sir.

Q. 29. Had you any relations with Mr. Barber, as client and attorney?

A. A great deal. He had prosecuted the county seat matter in Calaveras county, removing our county seat from Mokelumne Hill to San Andreas. I was the one that employed him to conduct the business on behalf of the citizens.

Q. 30. Had you business of your own with him besides that?

A. Yes, sir.

Q. 31. Do you know what Mr. Thorn refers to when he says, "In such case all would be up with us?"

817 A. I had, a long time prior to the introduction to Mr. Sinton, made arrangements with Mr. Thorn that Thorn and myself should buy that property and a good many other pieces, provided they were sold for taxes. I presume he refers to the fact that, if any parties would come in and redeem, that we would probably not get any benefit from the sale. I know of nothing else.

Q. 32. Now, when was the next time that you had any conversation with Mr. Sinton with respect to the Morgan mine?

A. It was in July, 1870.

Q. 33. What time in July; can you tell me?

A. It was before the middle; I can't give you the exact date.

Q. 34. Can you tell me what time you received the sheriff's deed to the mine?

A. On the 29th of June, 1870, I think.

Q. 35. Was this conversation, are you certain, before or after that?

A. I am positive it was after.

818 Q. 36. Now be good enough to state what occurred in that conversation between you and Mr. Sinton?

A. Mr. Sinton came down to my place of business and wanted to know if I had got a deed to the Morgan Mine Company property at Carson Hill from the sheriff of Calaveras county. I told him I had. He told me that he represented Mr. Fair and Mr. Selover, and that they wanted to get the property, and wanted to know of me how much I would charge for my title. I think that was the words he used. I remarked, in a kind of a joking manner, said I: "I will take a hundred thousand dollars." He said they would not think of giving anything like that amount. After talking quite a while I finally told him that I would take twenty thousand dollars. He seemed to think that that was quite a large price for it. I told him that as I knew the property and knew the history of it from its earliest days, I considered it very valuable property. There was not much more said that day upon that subject. He went away and came back again almost daily, or every two or three
819 days, for a couple of weeks, always talking about what I would take for my title. After we had talked quite a while, in one of the conversations—I can't remember in which one, but it was probably the third or fourth one—he told me that he would either write to Mr. Fair, or consult with Mr. Fair, I don't remember which—Mr. Fair and Mr. Selover. After some time when he came back he told me that Mr. Fair and Mr. Selover wanted the property and must have it; but that they wanted me to keep the property in my own name, and to defend any and all litigation that might come against it, and that they would pay me the twenty thousand dollars and all costs that might accrue; but they did not want a deed from me to them until all difficulties would be settled. I agreed to take the twenty thousand.

Q. 37. Did he give any reason why they wanted it to continue in your name?

A. Yes, sir; he told me that Mr. Fair and Mr. Selover did not desire to have it in their name, as they had been in litigation with other parties about it; and they wanted the title kept in me.

820 Q. 38. Do you know what litigation that was that he referred to?

A. It was Addison and others. At this same time that Mr. Sinton was negotiating with me, Mr. Addison was there almost as often as Mr. Sinton, representing the other side, and he was trying to make terms for my title also.

Q. 39. What Addison was that?

A. It was the one that died first—the one that was supposed to have committed suicide. I don't know whether it was William or John.

Q. 40. What occurred after that; did you receive any money from Mr. Sinton as coming from Mr. Fair?

A. I did. On or about the 19th of August, 1870, I received fifty dollars, or at least it was paid to John Douglas, who went up to

the mine from here to take charge, or to get into possession of the mine.

Q. 41. You mean to say that Douglas got fifty dollars from Mr. Sinton?

A. Yes, sir; I gave him an order, and he went up and
821 got the money from Mr. Sinton.

Q. 42. Mr. Sinton did not pay you the money directly?

A. No, sir.

Q. 43. Do you mean to say that that was the first money you ever received from Mr. Sinton?

A. That was the first money that I ever received from Mr. Sinton.

Q. 44. Did you not receive one hundred and five dollars from Mr. Sinton about the month of March, 1870?

A. I never did. I never received one hundred and five dollars from Mr. Sinton at any one time in my life.

Q. 45. You received no money from him before this fifty dollars paid to Douglas?

A. No, sir.

Q. 46. Are you sure of that, Mr. Irvine?

A. I am very positive of it.

822 Q. 47. It was in the month of February, 1871, that Mr. Sinton states you furnished him an account of expenses; do you remember anything of that?

A. I do.

Q. 48. That account is in evidence here, marked Exhibit No. 12, will you look at Exhibit No. 12, and tell me in whose handwriting that is?

A. It is my handwriting.

Q. 49. That is to say, the body of that?

A. Yes, sir; the body of it.

Q. 50. Are those words, "March, 1871," in your handwriting?

A. No, sir.

Q. 51. Do you know whose handwriting that is?

A. Yes, sir; R. H. Sinton's; I saw him write it.

Q. 52. And this on the back?

823 A. And that on the back is also in his handwriting.

Q. 53. You did hand that memorandum or account to Mr. Sinton, did you not?

A. Yes, sir.

Q. 54. Can you tell me when you did that, sir?

A. It was several days before the first of March; the exact date I do not remember; but he returned it to me on the first of March, 1871.

Q. 55. What is the nature of that account, and for what purpose did you hand it to Mr. Sinton?

A. Under the agreement that I had made with Mr. Sinton to receive twenty thousand dollars and all expenses, I made out this statement of expenses.

Q. 56. That, then, was a statement of expenses that you had incurred in and about the Morgan mine property?

A. Yes, sir; up to this time.

824 Q. 57. Mr. Sinton was informed of that, that it was a statement for that purpose.

A. Oh, yes, sir.

Mr. WILSON: Let the witness state what was said.

The WITNESS: I handed him this memorandum showing him for what the money had been paid out.

Mr. WILSON: I object to his giving any explanation of the paper, he can state what took place at the interview.

Q. 58. Mr. BOTTS: Very well; just state what you said to Mr. Sinton when you handed him that paper.

A. I handed him the paper and told him there was the expenses up to date, and I wanted to get the money. He then told me that he would have to write to Mr. Fair.

Q. 59. The account shows a balance due of what?

825 A. Five hundred and ten dollars and twenty-five cents.

Q. 60. It was that balance that you wanted to get?

A. Yes, sir; that balance.

Q. 61. Did you hear anything more from Mr. Sinton upon that subject?

A. Mr. Sinton informed me that Mr. Fair had not remitted the money, but that he would be down very shortly himself and call upon me and arrange it.

Q. 62. Did you ever receive that balance?

A. I did.

Q. 63. When, and from whom?

A. I received it from Mr. James G. Fair.

Q. 64. When?

A. In the month of March, 1871.

Q. 65. Where did you receive it?

826 A. At 226 Front street.

Q. 66. In the city of San Francisco?

A. Yes, sir.

Q. 67. What passed between you and Mr. Fair on that occasion?

A. Mr. Fair paid me the money and said to keep right on just as I was doing; that whenever any moneys became due that they would be forthcoming; that he did not wish to be known in the matter himself, but at the proper time he would make everything satisfactory to me; I then wanted to make him a deed and receive the money, and he objected to receiving the deed at that time, stating as his reasons that he did not wish to be known in the matter, but that to keep right on and do as I had been doing, and that he would pay me more for the property than anybody else.

Q. 68. Did anything further occur between you and Mr. Sinton, or you and Mr. Fair or Mr. Selover, concerning the sale of this

property for the sum of twenty thousand dollars, or any other sum?

827 A. Yes, sir; we had several informal meetings, I think, at Mr. Samuel Wilson's office.

Q. 69. Who met there?

A. Colonel Barnes, as he informed me, representing Mr. Fair; Mr. Wilson, as I was informed, representing Mr. Selover; Mr. Sinton was there himself, in person, and so was I.

Q. 70. Well, sir, what was the result of those meetings and negotiations?

A. The result of those meetings was that I offered to sell my title to the property for twenty thousand dollars, five thousand to be paid in cash, fifteen thousand to be paid in twelve months, with security, with all expenses.

Q. 71. Was that contract completed, sir?

A. No, sir; that contract, that meeting, I think, was on the 15th day of December, 1871, and it never was consummated.

Q. 72. Mr. Irvine, do you mean to state that the agreement was made by Mr. Wilson for his party, or that that was your proposal?

828 Mr. WILSON: I object to any construction of the interview by the witness, or to his testifying as to anything further than what took place at the time of the occurence.

Q. 73. Mr. BOTTS: I want to know how it resulted in the agreement; what took place?

A. During our conversation together at that meeting, I gave them my terms, and I was informed by Mr. Sinton that they were accepted; that is, as soon as the parties could be got together; that is, Messrs. Fair and Selover, that the thing would be arranged.

Q. 74. Neither of those parties was present?

A. Neither of those parties was present; and I at that time supposed that the sale was actually consummated; all except making the deed and receiving the money.

Q. 75. What occurred next in relation to that matter; did you receive any further money on account of expenses?

829 A. Yes, sir: I received afterward from Mr. Barnes' clerk, I don't remember his name; Dean, I think it is; I received money from him.

Q. 76. You recollect his statement about the money that was paid you; it was correct, was it not?

A. Yes, sir.

Q. 77. Was that subsequent to this negotiation or meeting at Mr. Wilson's office?

A. The meeting was subsequent to that, I think; the meeting was in December, and if I remember right, I received that money in November.

Q. 78. Are you certain about the time of the meeting?

A. Yes, sir; but I am not certain as to when I received the money.

Q. 79. You received the money at the time the checks are dated?

A. Yes, sir; I received the money with a statement of the clerk, Mr. Dean.

830 Q. 80. What, if anything, occurred toward the fulfilment or non-fulfilment of that contract, or the acceptance of your proposition?

A. Other expenses had accumulated, and I wanted more money. I could not get any; and I finally, after endeavoring to obtain money for expenses, I finally concluded to write to the parties, who I thought were the parties in interest—Mr. Fair, Mr. Selover, and Mr. Thomas Brown. I wrote them all on the 1st of October, 1872, I think, informing them that I was still ready to carry out the terms of the agreement of December 15th, 1871, but that, if they did not do something more than they had done, at the expiration of thirty days, I should consider the proposition entirely off.

Q. 78. Were the letters that you addressed to Mr. Fair and Mr. Brown in the same language as the one you sent to Mr. Selover?

A. Yes, sir.

Q. 79. One was but a repetition of the others?

A. I intended each one as a repetition of the others.

831 Q. 80. Did you get any reply to those notifications?

A. I did not.

Q. 81. Do you remember whether or not at that time an action of ejectment had been instituted against you?

A. Yes, sir; there had, long prior to that.

Q. 82. That was a suit instituted in the fourth district court, was it not?

A. I think so.

Q. 83. Do you know whether at that time that case had been determined in the fourth district court, or does your memory serve you about it?

A. It had been determined against me.

Q. 84. Do you recollect when that case was decided?

A. I think it was in March. I can tell you exactly if you will allow me to refer to my memorandum-book here. (Refers.) March 5, 1872, the judgment was rendered against me.

832 Q. 85. What was the date of the notice that you gave to Mr. Selover, Mr. Brown, and Mr. Fair?

A. That was October 1st, 1872.

Q. 86. Did you have any communication with Mr. Sinton with respect to any interest that he should have, or anything that he should receive from the Morgan mine, after you sent that notification?

A. There never was any conversation of that character between Mr. Sinton and myself at any time.

Q. 87. Was there any conversation between you and Mr. Sinton after this period with respect to the Morgan mine: I mean, now,

with respect to anything he was to have, or could have, or should have, in any event, from the sale or proceeds of the Morgan mine?

A. There never was such a conversation, or anything like it, until about the time I was going East, when he handed me a paper to sign.

833 Q. 88. Did you not have a conversation with Mr. Sinton on the steps of the custom-house?

A. That was about this letter: he was anxious that this letter should be forwarded to Mr. Selover and Mr. Fair, in order to force them, if possible, to comply with the terms of the agreement; he then informed me that if they would take the property and pay me the money, that he had an interest in the property with Mr. Selover, and that he was anxious to have the sale consummated.

Q. 89. Did he state to you then, or at any other time, what would be his condition if they did not take the mine?

A. Yes, sir.

Q. 90. What did he say about it?

A. He told me that he was entirely out—"afloat" was the term that he used.

Q. 91. Did you make any answer to that?

A. Nothing, only I said I was sorry for it.

834 Q. 92. Did you have conversations with Mr. Sinton about this property from time to time?

A. Yes, sir.

Q. 93. In what connection was it, and why was it that you had those conversations, and what was the character of those conversations?

A. When I sent this communication to Mr. Fair and Mr. Selover, and received no answer, Mr. Sinton seemed to feel very bad, and said that he had been connected with this property ever since early days, and that their refusing to comply with the terms of the contract let him out entirely; I then made the remark—said I, "Dick, don't feel so bad about it; if I ever sell this property for a large amount of money, you shall not be forgotten."

Q. 94. Do you know about what time that occurred—how long after the sending of these letters to the various parties?

835 A. It must have been within sixty days; it must have been some place [time] in November or December, 1872; he told me that he had received letters from Mr. Fair and Mr. Selover and ——. I don't desire to say the expression that he made.

Q. 95. Did he say of what purport the letters were; whether they declined or accepted, or anything about it?

A. The remark that he made use of to me was that they had declined having anything to do with the property—to let the mine go to hell.

Q. 96. You have seen and are familiar with that document called Exhibit No. 2?

A. Yes, sir.

Q. 97. That paper was signed by you, was it not?

A. Yes, sir, it was.

Q. 98. When and where did you first see that paper, and in what condition was it when you saw it?

836 A. I first saw it in Mr. Sinton's office, 539 California street, on the afternoon of March 28th, 1874, all written out as it is now.

Q. 99. Did Mr. Sinton show it to you?

A. He did. He sent for me to come to his office.

Q. 100. That day?

A. That afternoon.

Q. 101. Just detail what passed between you and Mr. Sinton at that time.

A. I went to his office. He handed me that paper. I looked at it and read it over. "Why," said I, "Dick, you have got no interest in this mine, and I won't sign this paper." "Well," said he, "you know you promised to do something for me." Said I, "That is very true." "Well, now," he said, "you are going away to the East, and suppose you should die on the way, or before you

837 got back," he said, "I have nothing to show that you ever promised to do anything for me." Said I, "That is so," and said he, "I would like to have something to show that you did promise to give me something, as a guard against accidents." Said I, "Dick, I will do this; I will sign this paper and leave it with Mr. Wilson. If I die on this trip and before returning to San Francisco, Mr. Wilson will give you the paper. If I do not die, and return to San Francisco, the paper is to have no force and effect between us." Said he, "That is all right." Then said I, "Let's go right over to Mr. Wilson's office." We started together and went there to Mr. Wilson's office—Tilden & Wilson. I there signed the paper and delivered it to Mr. T. K. Wilson on those terms; said that in the presence of Mr. Wilson and in the presence of Mr. Sinton.

Q. 102. Will you state as much in detail as you can what occurred when you went to Mr. T. K. Wilson's office?

A. When Mr. Sinton and I went into Mr. Wilson's office

838 there was quite a number in the office. Mr. Wilson rose from his seat and met us. I handed him the paper just that way (folded.) Said I, "There is a paper that Mr. Sinton wants me to sign." He took it in his hands and opened it, and looked at it this way (glancing over it) for half a minute or so. Said he, "What about it, any way?" Said I, "Mr. Wilson, Mr. Sinton wants me to sign that paper, and I have agreed to do it on condition that it is to be left in your hands, and be kept by you. If I die on this trip and before returning to San Francisco, you are to deliver it to Mr. Sinton, otherwise you will keep it and give it to me." Said he, "That is all right." So I sat down and signed it and delivered it to Mr. Wilson.

Q. 103. Did Mr. Sinton assent to or dissent from that statement made by you; did he say anything at all?

A. He said that was all right.

Q. 104. And that paper was then signed and delivered to Mr. Wilson?

839 A. Yes, sir.

Q. 105. You said something about your going East; did you go East?

A. I started the next morning, the 29th day of March, 1874.

Q. 106. Under what circumstances was it that you left for the East?

A. I had received dispatches announcing the death of my mother-in-law and father-in-law: my mother-in-law had died on the 27th, of apoplexy, and I was the only living executor of their will. I was telegraphed that I must come on immediately, as they had no children living except my wife, who was out here.

Q. 107. Was there any legacy left to your wife in that will?

A. Yes, sir; all their effects.

Q. 108. A large or small amount?

840 A. In the neighborhood of forty thousand dollars.

Q. 109. Where was Mrs. Irvine on the 28th of March, 1874?

A. She was at Stockton. She had already started East, I thinking she could possibly attend to all matters herself, and save me the trouble of going; but I received a dispatch from the lawyer representing the old gentleman's estate, stating that I must come; that I was the only executor. The old lady was the other one—that is, his wife—and she was dead.

Q. 110. Do you remember when you received that dispatch?

A. I received it on the morning of the 27th, I think; not the morning, but the middle of the day—the 27th of March, 1874. I then telegraphed to my wife to stop on the road and not go on; that I would have to go. I had all my affairs to arrange between that and the 29th.

841 Q. 111. Do you remember the time that you returned from that trip to the East?

A. I returned—I am not positive, but I think about the 27th of July.

Q. 112. Did you get that paper—Exhibit No. 2—from Mr. Wilson when you returned?

A. Four or five days after I returned I went to Mr. Wilson's office and demanded the paper. Mr. Wilson got up, went to his safe and hunted through his papers for probably ten minutes or more, and remarked to me, said he: "I can't just put my hand on it now, but I will hunt it up for you and hand it to you as soon as I find time." Said I: "All right."

Q. 113. Then you did not get it?

A. No, sir.

Q. 114. Did you have any other conversation after that with Mr. Sinton in and about this matter?

A. I think not.

842 Q. 115. Did you have any conversation with General

George P. Ihrie in relation to any interest that Mr. Sinton claimed in this mine?

A. I did have such a conversation.

Q. 116. Please state when and where and what was the purport of that conversation or those conversations.

A. The first conversation that I had with Mr. Ihrie took place in my office, in Front street, San Francisco, on or about the first of September, 1874. Mr. Ihrie told me that he had bought an interest in the Morgan mine from Mr. Sinton, under a declaration of trust that I had made. I remarked to Mr. Ihrie that I did not think Mr. Sinton had any interest; that I was back from the East, and was not dead; and that I thought that declaration of trust was not good for anything. He then stated that Mr. Sinton owed him some money, and that Mr. Sinton had sold him that property, and that if there was anything in it, he would like to get it. I then told him that Mr. Sinton had no interest and never had had an interest with me in the property. "But," said I, "Mr. Ihrie, if anybody would pay me half the expense that I have been to, I would deed them half of my interest." He remarked that he had no money, and did not want to buy. He then asked me if I would made him out a memorandum of the expense that I had been to. I told him I would. I done so, and gave it to him. He took it away with him and kept it for some week or so, and brought it back to me, stating that he was satisfied with his purchase from Mr. Sinton under my declaration of trust, and that he was going to have the property; and him and I had some sharp words in the office.

843

Q. 117. Have you got that paper?

A. Yes, sir.

Q. 118. Will you produce it?

A. (Produces Exhibit No. 13.)

844

Q. 119. Have you ever compared this paper with the one that is appended to Mr. Ihrie's deposition that purports to be a copy of it?

A. I never have.

Q. 120. You swear that this is the original paper that you handed to Mr. Ihrie?

A. Yes, sir.

Q. 121. Did you have any other conversation upon that subject with Mr. Ihrie than those you have detailed?

A. No, sir; we parted bad friends.

Q. 122. Did you ever have any conversation with Mr. Ihrie in the office of Messrs. Tilden & Wilson?

A. I never remember seeing him in there at all.

845

Q. 123. Do you know Mrs. Lizzie M. Sinton, the wife of Mr. Richard H. Sinton?

A. I do.

Q. 124. Do you recollect seeing her at the Nucleus, in this city, in or about the month of March, 1872?

A. I remember seeing her there.

Q. 125. Under what circumstances did you see her there?

A. Mr. Sinton was sick, and I called as a friend to see him.

Q. 126. Was there anything connected with the Morgan mine in your visit?

A. There may have been some conversation in regard to it, but I do not remember the particulars of the conversation; the probability is, there was something said about it.

Q. 127. March, 1872—at that time this arrangement that
846 you supposed to have been made between yourself and Mr. Selover and Mr. Fair had not been broken off, had it?

A. No, sir; I considered at that time that I was really working for Mr. Fair and Mr. Selover in the premises.

Q. 128. Do you recollect saying to Mrs. Sinton on that occasion, "Keep a good courage; just as soon as your husband gets his title here he will have more money than you and he can spend;" or words to that effect?

A. I may have said it; the chances are that I did.

Q. 129. What did you allude to in using that language?

(Question objected to and withdrawn.)

Q. 130. Why do you say it is possible that you might have used such language to Mrs. Sinton at that time?

847 A. Because previous to that Mr. Sinton had informed me that if this purchase was made from me, he would have an interest in the mine with Mr. Selover.

Q. 131. Do you know Henry D. Bacon?

A. I do.

Q. 132. What are the relations between you and Mr. Bacon?

A. As unfriendly as they well could be between two men.

Q. 133. Have you ever had any positive quarrel?

A. Yes, sir; we had one in your office; C. T. Botts' office.

Q. 134. On that occasion, was there any personal collision between you?

A. No, sir; you prevented me, or I would have whipped him right there.

848 Q. 135. I will ask you if that hostile feeling has ever been allayed, on your part or on his, to your knowledge?

A. Not on my part, I know, and I don't think on his.

Q. 136. There has never been any restoration of friendly relations between you?

A. No, sir.

Q 137. Did you ever say anything to Mr. Bacon concerning the relations between you and Mr. Sinton, or anything concerning any interest that Mr. Sinton had in this Morgan mine?

A. I never said anything to Mr. Bacon concerning any interest that Mr. Sinton had, because he never had any, not with me, I mean; Mr. Sinton had frequently told me that if this sale was consummated that he would have an interest with Mr. Selover.

849. Q. 138. Do you remember the time when the negotiations were pending that resulted in that compromise agreement between William Irvine and Henry D. Bacon and others, that has been put in evidence here?

A. I do.

Q. 139. During that period did you ever tell Mr. Bacon that Richard H. Sinton was interested in the Morgan mine?

A. I never did.

Q. 140. Did you ever tell Mr. Bacon at any time that you had acted as the agent and attorney of Mr. Fair, or of Fair and Selover, in the obtaining of the title to the Morgan mine?

A. I never did.

Q. 141. Particularly in the spring of 1874, did you make any such statement?

A. No, sir.

850 Q. 142. Do you recollect making any confidential communication to Mr. Bacon at or about that time—in the spring of 1874—when he interrupted you and told you that you hadn't better make any such a communication to him; that the time might come when he should be called upon to testify against you, or something of that kind?

A. In the spring of 1874? I never had any such conversation.

Q. 143. Or at any time?

A. Nor at any time.

Q. 144. Did you tell Mr. Bacon that you procured the Morgan mine from Mr T. K. Wilson, who purchased it at the tax sale, and that you paid the sum that Mr. Wilson was to pay, buying it in the name of the parties for whom you were acting as agent—Mr. Fair and Mr. Selover?

851 A. A portion of that is true; a portion of it is not true.

Q. 145. Tell me what portion is true, and what is not true; and, if any such conversation was passed, what it was?

A. Prior to April 14, 1873, when Mr. Bacon and myself were negotiating the compromise, the question between Mr. Bacon and myself was, what interest each one of us was to have in the premises: Mr. Bacon claimed three-quarters on his side, and I was claiming the whole. I then told Mr. Bacon that if Mr. Fair and Mr. Selover had done with me as they had agreed to do, that he, Bacon, would have had no interest there, as I considered my tax title good, and if Mr. Fair and Mr. Selover had bought it they would have had a good title against everybody.

Q. 146. Are you sure that that is all you said in that conversation; all, I mean, with respect to any title that Mr. Fair and
852 Mr. Selover ever had or could have acquired in that property.

A. I told him at the same time that I was informed by Sinton that he would have had an interest with Mr. Selover in the event of the purchase.

Q. 147. Is that all?

A. That is all, sir.

Q. 148. You say you went to New York, or to the East, as you express it, on the 29th day of March, 1874?

A. Yes, sir.

Q. 149. Do you remember that, about the time of your leaving San Francisco, you told Mr. Bacon that you had made a conveyance to Mr. Sinton of one-half of this property, or that you were about to make a conveyance to him, in view of your going away?

A. I could not have told Mr. Bacon——

853 Q. 150. (Interrupting.) Did you do it, or do you remember to have done it?

A. I did not; nothing of the kind.

Q. 151. Did you make such a statement to Mr. Bacon?

A. No, sir.

Q. 152. Are you positive of that?

A. I am positive of that, because I had never seen him after I had signed the declaration of trust. It was right after I had signed that, and I went home, and left the next morning for the East.

Q. 153. I ask you if, at any time during the month of March, 1874, or at any time at all, you ever stated to Mr. Bacon that you had made, or was about to make, a conveyance in trust of one-half of your interest in the Morgan mine to Richard H. Sinton?

A. I never told him anything of that kind at any time.

854 Q. 154. Did you ever tell Mr. Bacon of Mr. Sinton's embarrassments, and that it was not safe for Mr. Sinton to hold anything in his own name, and that any conveyance that you made would be a conveyance in trust?

A. No, sir; never.

(Here a recess is taken until two o'clock p. m.)

Afternoon Session.

Present: Messrs. Wilson and Hayes, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendant.

Examination-in-chief of WILLIAM IRVINE resumed.

Q. 155. Mr. BOTTS: Mr. Irvine, I notice in Exhibit No. 13, purporting to be an account of expenditures made by you in and
855 about the Morgan mine, that there are several items that are charged one-half of the amount. Will you tell why and how it was that you made a memorandum of one-half instead of the whole of the amount?

A. After I entered into the agreement of April 14, 1873, Mr. Bacon agreed to bear the expense of obtaining the patent, and I was to put in my time. After the patent was obtained, then the expense fell equally on Mr. Bacon's party and myself. That is the way it was made out for half, because already one-half had been paid by Mr. Bacon and the others after the isssuance of the patent.

Q. 156. For instance, here is an item: "Cash, United States office, $50; one-half of this charged—$25." You had only to pay

twenty-five dollars of the fifty. Is that it; do you mean that you were to pay only one-half of that?

A. I was to pay one-half.

856 Q. 157. And the same is the case with all the other items of that kind?

A. The same with the other items; I received the other half of Mr. Bacon; I paid all the money first myself, and then presented an account to Mr. Bacon; he was to pay all the expenses in obtaining the patent, and I was to give my time as an off-set.

Q. 158. Were there not some of the expenses that are enumerated in this account here, of which you were to pay only the half?

A. Certainly, after the patent had issued; anything outside of the patent, of course, I had to pay half.

Q. 159. I am asking you now about this account; you have stated in this case that fifty dollars expense was incurred, and you have extended it at twenty-five dollars?

857 A. Well, if it was expenses in obtaining the patent after the 11th of April, 1873, it should have been all charged in that bill, because Mr. Bacon, as I said before, agreed to furnish all the money, and I agreed to furnish my time.

Q. 160. The item of the 19th of April, 1873, is: "Cash paid United States office, $50; one-half of this, $25; why is that charged twenty-five dollars instead of fifty; look at the item, and explain that item?

A. (After examination.) That should be fifty dollars.

Q. 161. I am not asking you what it should be; there are some items in that account that are charged at one-half of the amount of the actual cost?

A. Yes, sir.

Q. 162. Why was that?

858 A. Because, after I had obtained the patent, then the expenses were to be borne jointly by Mr. Bacon and myself.

Q. 163. Do you want to make any further explanation about that?

A. No, sir; that is the only explanation I can give.

Q. 164. What explanation?

A. That after the patent had issued the terms of the contract between Mr. Bacon and myself had ceased, so far as his bearing the entire expenses was concerned. You will find that in that article of agreement; after that I had to pay one half of the expenses for keeping the property and taking care of it.

Q. 165. Mr. Fair, it appears from the testimony here, instituted a suit against you in the fourth district court to recover this property?

A. Yes, sir.

859 Q. 166. Do you recollect the date of that suit?

A. I can give you the date exactly from a memorandum taken from the papers.

Q. 167. Give me about the date.

A. It was in the fall of 1870.

Q. 168. Was there any agreement between you and Mr. Fair, or any agent of Mr. Fair's, that that suit should be so conducted as to confirm the title in you?

A. None, whatever.

Q. 169. Had you any arrangement, or any agreement, with Mr. Fair, or any agent of Mr. Fair's, in and about that matter?

A. None, whatever; I was anxious to have the title confirmed in myself.

860 Q. 170. Defendant's Exhibit "A," look at that; when was that money paid to Mr. T. K. Wilson?

A. July 9th, 1870.

Q. 171. When did you first know or understand the amount that you would have to pay to Mr. Wilson on account of the transfer that was made to you of the title purchased at the tax sale?

A. July 9th, 1870.

Q. 172. Had you before that time had any conversation with Mr. Wilson upon the subject of that transfer?

A. Yes, sir.

Q. 173. What was the character of that conversation?

A. The character of it was that the certificate of sale had been made out in my name, and when the six months would expire I would get my deed, unless it was redeemed.

861 Q. 174. But nothing, I think you stated, with respect to the amount of money to be paid?

A. Nothing at all; because I did not know anything at all about that until July 9th, 1870.

Q. 175. Was that before or after you got the sheriff's deed?

A. That was after I got the sheriff's deed. I had received the deed, and then went up to settle with Mr. Wilson.

Q. 175. You said, I think, that some time in February, 1871, you presented to Mr. Sinton Exhibit No. 12, upon which he has written the words "March, 1871," and endorsed "March 1st, 1871"?

A. I did.

Q. 176. The first item in that memorandum or account reads: "Taxes to T. K. Wilson, July 9th, 1870, $123.50." The next: "Fees to ditto, 825." Did or did not Mr. Sinton make any objec-

862 tion to either or both of those items?

A. He made no objection whatever.

Q. 177. Where, when, and by whom were the papers filed in the land office in view of obtaining the patent to the Morgan mine made out?

A. They were made out by H. W. or W. H. Weaver, a clerk in the land office at Stockton.

Q. 178. Did not T. K. Wilson make out those papers?

A. No, sir; had nothing to do with them; never saw them.

Q. 179. He was your lawyer about this matter?

A. He was; but he said he did not know anything about making out those papers, and told me to go to the land office and have them

made out, and then there would be no mistakes. I went up there and employed Mr. Weaver to do it, and gave him forty dollars.

863 Q. 180. Did not Mr. Sinton make out those papers?

A. No, sir; never saw them, either.

(Here a continuance is taken until Saturday, 30th instant, at half-past ten o'clock a. m.)

SATURDAY, *June* 30, 1877.

Present: Mr. Wilson, of counsel for complainant; Messrs. Botts and Garber, of counsel for defendant.

Cross-examination of WILLIAM IRVINE by Mr. WILSON:

Q. 181. In your testimony upon the day before yesterday you stated that you regarded the Morgan mining property referred to as a very valuable property. What did you regard its value at the time you purchased the same upon the sale for delinquent taxes?

864 A. I did not put any special value on it at all—any particular value.

Q. 182. About what did you regard it as worth at that time?

A. I never set any estimate upon it at all, because it was not mine.

Q. 183. Did you, at that time, have any idea of its approximate value?

A. I judged from what has occurred in past years.

Q. 184. Give us some idea of your then estimate or judgment of its general value.

A. As I stated before, I placed no particular price upon it, or value upon it; I knew from its past history that it had developed some very rich ores; I could not tell whether they had all been extracted, or whether there was some more left; I presumed there

865 was some more left, but as to putting any particular value on it I never did at that time.

Q. 185. Did you consider it at that time worth the amount that you laid out for the taxes?

A. Yes, sir.

Q. 186. Did you consider it worth any more than that?

A. I did if I could get the title; I considered it valuable property providing a good title could be got to it.

Q. 187. What would you estimate its value with a good title at that time?

A. I never placed any value upon it, because I had no means of doing it; the value of such property depends upon whether you can find a purchaser or not.

Q. 188. What would you have been willing to give for an undisputed title at the time you bought it for taxes?

866 A. Under my circumstances at that time I would not have

paid any great deal for it, because I was not in the mining business, and had not money to put into it to develop it.

Q. 189. In December, 1871, what did you regard its value?

A. I regarded it then at twenty thousand dollars.

Q. 190. Did you regard your interest, which you then claimed, as worth twenty thousand dollars?

A. I asked that for it, and would have sold it for that very gladly if I could have got the money.

Q. 191. Did you consider that your interest at that time was worth that money?

A. If I could get the money for it.

Q. 192. Did you consider your interest worth it?

A. I must have considered that or I should not have asked that for it.

867 Q. 193. What did you consider your interest worth at the time you agreed with Mr. Sinton to take the twenty thousand dollars for your title?

A. Twenty thousand.

Q. 194. What did you consider the value of your interest on the 1st of October, 1872?

A. Twenty thousand.

Q. 195. What, on the 14th of April, 1873?

A. At that time I had placed no value on it different from previous.

Q. 196. You mean to say that you held to the same value?

A. I did not think anything at all about the value, because there was no person asked me about the value at that time.

Q. 197. Had you no idea, on the 14th of April, 1873, as to the value of your interest in that property?

868 A. Only through consultation with Mr. Bacon and his parties.

Q. 198. What, at that time, in your own mind and judgment, did you estimate the value of your interest to be?

A. Well, I have never changed my opinion; since that time I have never been called on to fix its value.

Q. 199. What is the least money that you would have taken on the 14th of April, 1873, for your claim to the property?

A. Well, I really don't know what I would have taken, if I had received an offer.

Q. 200. You mean to say, then, that you had no idea, one way or the other, of the value of your interest on the 14th day of April, 1873?

A. I had just this idea, that if an offer had been made me
869 of any reasonable amount of money, I think I would have taken it.

Q. 201. What would you have considered at that time a reasonable amount for your claim?

A. I presume at that time if any person had handed me ten thousand dollars in cash, I would have given them my interest; I

would have asked more than that, and if I could have got it I would have taken it.

Q. 202. What did you regard the value of your interest in the mine on the 28th of March, 1874?

A. That was the time that the corporation was formed?

Mr. BOTTS: That is the date of the declaration of trust.

The WITNESS: I had about the same opinion then that I have expressed.

Q. 203. Mr. WILSON: Well, about what at that time did you estimate the value of your claim?

870 A. As I have stated, I would have taken, I have no doubt, I was not offered it, but I have no doubt that if ten thousand dollars had been offered to me, or any reasonable amount of money, I should have sold. I had no fixed price; it depended entirely upon circumstances.

Q. 204. What did you regard the value of your interest in the property on the 1st of September, 1874?

A. About the same figures.

Q. 205. About ten thousand dollars?

A. Yes, sir.

Q. 206. At the time of your departure for the East, in March, 1874, were you a man of family?

A. Yes, sir.

Q. 207. Of what did your own family consist?

A. A wife and four children.

871 Q. 208. Had you at that time brothers and sisters?

A. Yes, sir: not sisters; I had one sister.

Q. 209. At that time, and independent of the estate coming to your wife by the death of her parents, about what did you estimate your own pecuniary worth?

A. That would be very hard for me to state; I had a great deal of land, houses, quartz mills, saw mills, cattle horses, mules, &c., in the county of Calaveras.

Q. 210. Can you give, as a general idea, taking into consideration your assets and liabilities, about what you rated your pecuniary worth?

A. I did not owe anything. What I had was entirely, very much like the Carson mine was; it depended upon whether I could find a purchaser.

872 Q. 211. Your property was what is called mining property?

A. Principally mining property and property in mining towns in Calaveras county, besides my interest in the store here.

Q. 212. You cannot, then, give us any idea at all of what your pecuniary work was at that time?

A. I could not, from the very fact that I had property there that cost a great deal; but property there is not like what it is in San Francisco.

Q. 213. Mr. Irvine, during your negotiations with Mr. Bacon, which have been referred to here, did you consult with Mr. Sinton concerning the same?

A. I did.

Q. 214. Did you consult with Fair and Selover concerning the same?

A. No, sir.

Q. 215. Why not?

873 A. Because at that time I did not consider they had any interest.

Q. 216. Mr. GARBER: What time was that?

A. On or before March 14, 1873.

Q. 217. Mr. WILSON: Did you not tell Mr. Bacon during the negotiations that you were working for Fair and Selover in the matters relating to that mine?

A. No, sir.

Q. 218. Why did you not tell him that?

A. Because it would not have been true if I had.

Q. 219 When you were about to go East in March, 1874, did you not communicate the fact of your anticipated absence to Mr. Bacon or some of the other parties whom you realized as joint owners with you in the mine?

874 A. I told Mr. Bacon that I was going East. I showed him the dispatches that I had received from there.

Q. 220. Did you give him any idea about your expected or intended absence—the length of time that you intended to be absent?

A. I did.

Q. 221. What was your expectation at that time?

A. I expected to be gone about six weeks or two months.

Q. 222. Did you communicate the same fact to Mr. Sinton of your expected absence?

A. I did.

Q. 223. Did you communicate that fact to Mr. Selover or Mr. Fair?

A. No, sir.

875 Q. 224. Have you any memorandum showing when the suit involving the tax title—that is, the suit of Fair *vs.* Irvine—terminated in the district court or in the supreme court?

A. (Referring to pocket memorandum book.) It terminated in the district court November 27th, 1871. I don't recollect when it terminated in the supreme court.

Q. 225. Have you now in your possession here the bill of items making up the sum of money which Mr. Fair paid you, to which you have referred in your examination-in-chief?

A. Yes, sir.

Q. 226. Please present the same and identify it.

A. (Produces.) This is the paper heretofore referred to as Exhibit No. 12, showing outlays of $910.25, credits of $400, leaving a balance of $510.25.

876 Q. 227. Will you please state at what time Mr. Fair paid you that balance?

A. He paid me in the month of March, 1871.

Q. 228. By whom were the two items of credit paid—cash $150 and cash $250?

A. I received those from Mr. Sinton.

Q. 229. Have you now a memorandum of, or can you tell us the dates of the payment of the two sums of $150 and $250, or the lesser sums, making those up?

A. I have no memorandum outside of what is there.

Q. 230. Were those two items paid to you in the sums indicated, that is, in two payments, one of $150 and the other of $250?

A. That is my recollection.

Q. 231. How long before March, 1871, were they paid you?

A. They were paid me between August 15th 1870, and
877 March 1st, 1871.

Q. 232. The first item—"taxes to T. K. Wilson, July 9, 1870, $123.50"—I understand to be the amount which you paid for the property in consideration of your receiving the sheriff's deed for delinquent taxes?

A. I paid that to T. K. Wilson; I had received the sheriff's deed at that time; I went to T. K. Wilson not knowing how much the amount would be; I didn't know whether he would charge me the percentage usually due to purchasers, or charge me the common rate of interest on the amount.

Q. 233. That $123.50 was for the delinquent taxes?

A. Yes, sir.

Q. 234. The fees charged here—$25—were for Mr. Wilson's services for you in that behalf for purchasing the property?

A. Yes, sir.

878 Q. 235. And did that accrue due prior to July 9th, 1870?

A. Yes, sir.

Q. 236. Please explain the item: "Acknowledging pow. att'y, price, $100."

A. I had to get what is called a writ of assistance from the court to get into possession of the property. The writ was issued to me. I was not there myself in person, and therefore I had to send a power of attorney authorizing Douglas to act in my stead, to have the sheriff put him in instead of me.

Q. 237. The travelling expenses referred to here were those of whom?

A. Those at that time of Douglas, to carry out my instructions.

Q. 238. What records were those, the copy of which is charged for here, $13?

879 A. Really I have forgotten what they were. It was a copy of records that I got from the recorder's office. What the items were I don't know.

Q. 239. Was it in reference to the title of the property?

A. Yes; it was in reference to the title of the property.

Q. 240. "Wages for man from Aug. 19, 1870, to February 19, 1871—six months—$600." Were those the wages of Douglas?

A. Yes, sir.

Q. 241. What were those services that he was performing during that period?

A. He was the keeper of the property.

Q. 242. Remaining in charge of the mine?

A. Yes, sir; nothing but remaining in cearge.

Q. 243. What was the retainer of one hundred dollars paid to T. K. Wilson for?

880 A. When I settled with Mr. Wilson and paid him that $123 and the other amount, I told Mr. Wilson at that time that if there was any more trouble about the property that he could could consider himself as retained as counsel for me.

Q. 244. When did you pay that to Mr. Wilson?

A. I don't remember the date of that exactly. It was some time in the fall of 1870, but what time I could not say. It was about the time, I am satisfied, that Mr. Fair sued me.

Q. 245. During your examination upon Thursday you referred to a conversation you had had with Mr. Ihrie, and stated that you informed him at that time that if anybody would pay you half of the expenses that you had been to in reference to that mine you would deed them half of your interest in that property. Did you make that statement to him in good faith?

A. I did.

881 Q. 246. After Mr. Ihrie stated to you that he had not any money, and did not want to buy, and you had informed him that Mr. Sinton had no interest in the property, why did you render to Mr. Ihrie an account of the expenses that you had been to in the matter?

A. Because he asked me to do it, and I didn't know but possibly he might come to the conclusion to take my offer. The facts were, I began to see a good deal of difficulty—at least, I imagined that I saw a good deal of difficulty ahead; and I concluded that if I could get four or five thousand dollars in cash that I had better own a quarter.

Q. 247. Mr. GARBER: (Interrupting.) Difficulty in what respect?

A. Oh, litigation. I was in with Bacon, and they were endeavoring to get the control, and I thought if they did I would be assessed out of the property, and I wanted to prepare myself to stand the assessments.

882 Q. 248. Mr. WILSON: Did not the declaration of trust to which you have referred, provide for a payment by Mr. Sinton, or his assigns, of all expenses, &c.?

Mr. BOTTS: I object; the delaration of trust speaks for itself.

A. I presume it does.

Q. 249. Mr. WILSON: If the declaration of trust provided for a payment by Mr. Sinton, or his assigns, of one-half of all expenses

to which you had been put in reference to the mine, including counsel fees, and you had offered to Mr. Ihrie to make a conveyance of one-half of your interest to anybody who would pay one-half of those expenses, what was it which occasioned the sharp words between yourself and Mr. Ihrie, causing you to part bad friends, as you have stated?

A. When Mr. Ihrie returned to me the memorandum that
883 I gave him of expenses, he then told me that he was perfectly satisfied with the title he had got from Sinton, under my declaration of trust, and he intended to have the property. I told him he never should have it; he had no interest in it. He said he would have it, and I said he shouldn't. It continued on in that style of language, until finally he went off mad.

Q. 250. Was it not very shortly after that, that Ihrie commenced an action against you in one of the courts here?

A. He commenced an action—it was sometime, I think, after that.

Q. 251. Haven't you a memorandum of the time of the commencement of that action?

A. (Refers to pocket memorandum book.) It was October 31st, I think, 1874.

Q. 252. Don't you remember that his action was based upon that declaration of trust?

A. I don't know what his action was based upon; I presume it was.

884 Q. 253. Don't you know that in that action he offered to pay you one-half of all the expenses that you had incurred, according to the terms of the declaration of trust?

A. I do not remember that.

Q. 254. Why did you not at that time, when he had brought his [——] for one-half of the property, offering to pay you one-half of the expenses, make the conveyance to him of one-half, and accept from him the one-half of the expenses?

A. Well, we had parted bad friends, and we did not get together. That is one of the reasons.

Q. 255. Why did you defend that action?

A. The action of Ihrie against me?

Q. 256. Yes; when he offered the terms in it that you were willing to accept?

885 Mr. Botts: That is objected to, because it is assuming that which has not appeared—that Ihrie offered any such terms.

A. In the first place, I don't remember of any such terms being offered me in that action. If my memory serves me correctly, that action was to restrain me from deeding to that corporation; he setting up that he was an equal owner with me under that declaration. I never remember any offer being made in that complaint

against me that he would pay half the expenses. It may be in it, but my memory fails me entirely if such be the case.

Q. 257. Mr. WILSON: If in that action he offered to account to you for one-half of all the expenses, practically carrying out the offer which you say you made to him—to convey to anybody who would pay the one-half of the expenses—can you now say why you did not transfer to him the property and accept from him the payment of one-half of your expenses?

886 A. In the first place I never remember it, and in the second place Mr. T. K. Wilson had to be settled with for his services, and that consideration was not put into the bill that I furnished Mr. Ihrie.

Q. 258. Why did you not put that in the bill that you furnished Ihrie?

A. In the first place I did not consider that that would be any part of the purchase, because I did not consider at that time that the declaration that I had made amounted to anything.

Q. 259. You furnished Ihrie with an account purporting to be an account of all your expenses and disbursements connected with that mine, did you not?

A. Yes, sir.

Q. 260. Why did you not then embrace in that any claims which Mr. Wilson had against you concerning that mine property?

887 A. Mr. Wilson's claim against me was a conditional one.

Q. 261. What was the condition?

A. When I made the agreement with Mr. Bacon and others, of April 14, 1873, I then expected that the property would be sold for quite a large amount of money during that year coming. If that had been consummated, I told Mr. Wilson that I would give him ten thousand dollars, provided the property was sold for anything like what I expected. The property not being sold, I did not consider that I would owe him ten thousand dollars. I might owe him a reasonable fee, but not ten thousand dollars at that time.

Q. 262. But as you rendered an account to Ihrie in September, 1874, why, the condition that you have above referred to having entirely failed, did you not put into it some reference to Mr. Wilson's claim for fees?

888 A. In the first place I was not asked to do that; I merely stated to Ihrie that if anybody would pay me one-half of what I had already paid that I would deed them half the property; if Ihrie had come out and talked business of buying, that matter of Mr. Wilson's would undoubtedly have been bought up before the thing was consummated; I should have said, "That is the money that I have already paid out, and here is what I am to pay Mr. Wilson;" I should have went to Mr. Wilson and settled with him.

Q. 263. How did you get back from Mr. Ihrie that account that you rendered to him?

A. He brought it back himself as per agreement.

Q. 264. What was that agreement?

A. Simply that he should return it after he would see what the amount was.

889 Q. 265. When you made the promise to Mr. Sinton to which you have referred in your examination-in-chief, by which, in substance, you promised to do something for him, or told him that on selling the property for a large sum he should not be forgotten, what obligation were you under to him which would induce such a promise as that on your part?

A. None whatever, except a matter of friendship, and the appeal that he made to me at the time that he told me that he had heard from Mr. Fair and Mr. Selover that they abandoned the enterprise, or would not take the property.

Q. 266. Was that promise made to him at the time he gave you that information of their abandonment of your proposal?

A. Right then and there; he held the letters right in his
890 hands, and shew them to me, and stated that that let him out; it was in his office in Montgomery street.

Q. 267. What was it that created that bond of friendship to which you have referred between you and Mr. Sinton; what transactions and relations had you which made that degree of warm attachment?

A. In the first place he was the gentleman who conducted pretty much all the negotiations between Mr. Selover, Mr. Fair, and myself, and was very anxious to have that purchase consummated; and I was very anxious to get the twenty thousand dollars.

Q. 268. Were your obligations to Mr. Sinton, or your relations to him, different at the time of your departure for the East in March, 1874, to which you have referred, than they were at the time just above referred to?

A. None whatever.

891 Q. 269. In the letter of Sheriff Thorne to yourself, dated January 10th, 1870—Defendant's Exhibit "B"—a reference is made to two letters of yours of the 31st of December and 5th of January. Have you the originals or copies of those letters?

A. I have not.

Q. 270. Do you remember the purport of them?

A. I think I do.

Q. 271. Please state what they were.

A. As I stated yesterday, a long time prior to my instructions to Mr. Sinton, I had made the arrangement with Thorne that he and I should buy that property, and many other pieces of property in Calaveras county, providing they were sold for taxes. The sale of the Morgan mine, I think, took place on the 28th of December, 1870. By some means I had found out that this property had been sold, and that neither Thorne nor myself were the purchas-
892 ers, and also some property that I was interested in, having mortgages against it; and the property wouldn't pay me to foreclose the mortgage, and I thought that if I got somebody, that is, Thorne, to buy it for me, I would do that. I wrote to Mr. Thorne

asking him why he had not carried out his agreement with me and made the purchase; and that title, Exhibit "B," is in answer to those inquiries.

Q. 272. Where is Mr. Thorne now?

A. He is in Calaveras county, in the same place—San Andreas.

Q. 273. Have you ever applied to him for those letters?

A. I never have.

Q. 274. Do you know whether or not he has them?

A. I have not the slightest idea.

Q. 275. How long before the date of this letter had that
893 arrangement been made between you and Mr. Thorne?

A. Oh, it was several months; I think we first talked of it in 1867: he afterwards gave me his reasons why he did not buy the property.

Q. 276. They are given in this letter, Exhibit "B," are they not?

A. I think not: not the reasons that he gave me: that is, if I remember the letter correctly.

Q. 277. Was the arrangement between you and the sheriff, to which you have referred in regard to the tax title, in substance that you would buy these several pieces of property in for your joint account—share the expenses and profits of them?

A. Yes, sir: we had been operating together a great deal in quartz mining as partners, hiring men and paying them mutually.

Q. 278. Had you and the sheriff at any time previously
894 bought property in at tax sales for joint account, or been jointly interested in tax titles?

A. No, sir: we never had a tax title prior to about this time that we ever considered good for anything. There was a special bill passed for that county and some others—passed, as we intended, to convey good titles at tax sales. A great many people would not buy property for sale for delinquent taxes there, because under the old law they could not get a good title.

Q. 279. Whether the tax titles were good or worthless, did you ever own one in common—you and he?

A. No, sir; no tax titles. We owned property in common.

Q. 280. The letter of Sheriff Thorne is dated January 10th, 1870; at what place did you receive it, and about when?

A. I received it in San Francisco. I presume it came in
895 the natural course of time. I don't remember the date.

Q. 281. In due course of mail?

A. I presume so. To the best of my recollection, it did.

Q. 282. What time was usually required at that time for a letter to reach here from that place?

A. It was usually about three days at that time.

Q. 283. How long after the receipt of that letter before you showed it to Mr. Sinton?

A. I could not say exactly; a few days, no doubt. Possibly the first time I had an opportunity of showing it to him.

Q. 284. What was your object in showing that to Mr. Sinton?

A. Simply to show him that I had not got the property—that I had not bought it. I know of no other reason.

896 Q. 285. Do you remember whether he read the letter, or that portion of it referring to the Morgan mine?

A. My recollection is that he did not, but I am not positive of that; my impressions are that I told him the contents of it.

Q. 286. Did you tell him honestly the real contents of it, if you told him at all?

A. I did.

Q. 287. Do you remember what he replied when you showed him that letter or communicated its contents?

A. I don't remember what he said; there was very little said about it; there was very little said, because we considered that the thing was all off; the letter conveyed the news to me that I was not the purchaser.

Q. 288. What was it that was all off, to which you have referred?

A. The purchase.

897 Q. 289. Why did you want to communicate to Mr. Sinton the fact that you were not the purchaser?

A. I can give no reason for that except this, that Mr. Gatewood had, in the presence of Mr. Sinton and myself, stated that I had better buy the property; and, not having bought it, I presume that I naturally said: "Well, Dick, I didn't buy the property."

Q. 290. Would not your purchase of the tax title have been hostile to Sinton's interest, as you understood it?

A. I didn't know then at that time that Mr. Sinton had any interest in the property?

Q. 291. At what time?

A. Prior to the sale; nor at any time before July, 1870; he then informed me for the first time that he had an indirect interest with Mr. Selover.

898 Q. 292. So that at the time of the interview, yourself and Mr. Sinton and Mr. Gatewood, and at the time of exhibiting the Thorne letter to Mr. Sinton, or telling its contents to him, you did not know that he had any interest in the mine?

A. Not a particle. I had understood it was Fair's, and that Fair and Selover had quarrelled, and even Selover was out. That was the report in Calaveras county—that Fair was really the owner of the property, and nobody else.

Q. 293. In your examination-in-chief, page 333, in answer to Q. 36, you stated, among other things, that you told Mr. Sinton that you would take twenty thousand dollars for your claim to the property, and that he returned afterwards and talked to you again upon the subject, and told you that Fair and Selover had been heard from, and that they would pay you the twenty thousand dollars and all costs that might accrue, and wanted you to keep the property in your own name, and defend it against all litigation

899 that might come, &c. Will you state now, as near as can

be, when that conversation occurred in which he informed you that they had accepted your proposition?

A. On or before the middle of July, 1870. It was in the month of July, and I think it was before the middle.

Q. 294. You went on, then, after that understanding with Mr. Sinton, and for some time under that agreement, did you not?

A. Yes, sir; under the understanding between Mr. Sinton and myself. There was virtually no agreement.

Q. 295. How long did you continue to act under that agreement for Fair and Selover, and when did you cease to act, in reference to that mine, on their behalf?

A. It must have been on or about November or December, 1872, when I had sent them the notification, and Mr. Sinton informed me that he had received an answer from the parties, and said
900 that they would have nothing to do with it, and let the mine go to hell.

Q. 296. After that time do you mean to be understood that you ceased to act on their behalf and acted entirely on your own behalf?

A. Yes, sir; acted entirely for myself.

Q. 297. Did you notify them of that fact in any other manner than through your letter of October 1st, 1872?

A. No, sir.

Q. 298. Can you remember now about the first time that you learned of Mr. Sinton having an interest under Fair or Selover in the mine, in expectancy or in fact?

A. During the month of July or August, 1870—my best recollections are July—at the time he was negotiating with me for the purchase for Fair and Selover. He then told me that if they got the title to the property that he would have an interest—an indirect interest was the term he used—with Mr. Selover.

901 Q. 299. Did he state how much?

A. He did not.

Q. 300. How are you enabled to fix the date of the interview at the Nucleus Hotel in this city, to which you have referred, at which Mrs. Sinton, the wife of Richard H. Sinton, was present?

A. I did not fix the time. I understood the question as referring to an interview about that time. I do not pretend to fix the date of the interview.

Q. 301. Can you now fix the date or approximate it?

A. I could not. I remember distinctly being there to see Mr. Sinton because he was sick; but even what month it was I never charged my memory with.

Q. 302. Can you fix the year?

A. 1871.

Q. 303. Are you certain about the year?

902 A. Yes, sir; I think I am correct on the year; I am not certain; I wouldn't be positive as to the date, because I have nothing by which I could really place the date; I took no interest

in the matter beyond merely going to see Mr. Sinton, because he was sick.

Q. 304. Do you remember visiting him more than once?

A. I remember twice at the Nucleus.

Q. 305. Each at the same place?

A. Yes, sir.

(Here a continuance is taken until Tuesday next, July 3d, at 11 o'clock a. m.)

After the reading of the testimony by the witness, he wishes to correct his answer to question 203, as follows: Those two items were composed of several lesser sums paid at different times, but the several amounts composing these two items I do not re-
903 member, except that the first sum paid me was fifty dollars ($50), paid to me by R. H. Sinton on the 19th day of August, 1870, as I have hereinbefore stated.

WILLIAM IRVINE.

904 *Deposition of H. J. Tilden.*

TUESDAY, *September 25th*, 1877.

Present: Mr. Wilson, of counsel for complainant; Mr. Botts, of counsel for defendant.

Examination-in-chief of H. J. TILDEN, a witness on behalf of the complainant, in rebuttal.

By Mr. WILSON:

Question 1. What is your name, residence, and profession?

Answer. Name, H. J. Tilden; residence, San Francisco; occupation, attorney-at-law.

Q. 2. How long have you lived here in the city?

A. Last eleven years.

Q. 3. Practicing your profession?

A. Yes, sir.

905 Q. 4. Were you a partner during that time, and are you now, of T. K. Wilson?

A. I am now a partner of his, and have been, I think, since 1870—about that time, 1869 or 1870.

Q. 5. Do you know the parties, plaintiffs and defendants, in this case, Sumner T. Dunham, William Irvine, and The Morgan Mining Co.?

A. I know Irvine and the Morgan Mining Co.; I don't think I know Mr. Dunham.

Q. 6. How long have you known Mr. Irvine?

A. I think I have known him 17 or 18 years.

Q. 7. What relation do you occupy to the Morgan Mining Co., and how long have you held that relation?

A. Well, I can hardly say; we have done some business as attor-

neys for the Morgan Mining Co., and also Irvine, but as my
906 partner attends to that, I don't know the extent and relation—that is, he is attending to the most of it.

Q. 8. How long have you occupied the relation of being attorney for the Morgan Mining Co.?

A. I can not tell you. As I say, my partner attended to that business, I think, wholly.

Q. 9. Attended to it as a member of your legal firm?

A. Certainly. That is, whatever has been done for the Morgan Mining Co.—the extent I don't know.

Q. 10. As a member of your firm, not for himself?

A. As a member of the firm.

Q. 11. How long back does your relationship as attorney for Irvine extend?

A. I can not say exactly.

Q. 12. Yourself or your legal firm?

A. Yes, as the firm, I think, '71, perhaps '72; without looking I could not say.

907 Q. 13. Have you at any time been one of the trustees or directors of the Morgan Mining Co.?

A. I never have.

Q. 14. I thought you had been a director of the company?

A. No, not to my knowledge; if they have got me in I don't know it.

Q. 15. Do you remember of the departure of the defendant Irvine to the Atlantic States in or about the latter part of March, 1874?

A. I do; but I could not state the exact time—about that time.

Q. 16. Do you remember being present at any interview about that time between the defendant, Irvine, Richard H. Sinton, and Mr. T. K. Wilson, at your law office in this city?

A. Yes, sir; I recollect meeting the parties there about that time.

908 Q. 17. Will you please state what transpired on that occasion?

A. Let me ask you if that refers to the time of that paper you are speaking of?

Mr. WILSON: Yes, sir.

A. My recollection is, I came into the office and found these parties there that you have named and was requested to witness a paper, and I did so.

Q. 18. By whom was this paper signed?

A. I think the paper was signed by William Irvine.

Q. 19. Can you state what further occurred on that occasion?

A. I don't think anything else took place in my presence or in my hearing.

Q. 20. Who requested you to sign the papers as a witness?

A. Well, I could not say whether it was Mr. Sinton or Mr. Irvine; probably one or both of them. I came in there and they re-

quested me to witness this paper; perhaps it might be my
909 partner.

Q. 21. Were you called in from the adjoining room for the purpose of witnessing it, or when you requested to do so?

A. My impression is, that I came in and they were there, and as I came in they asked me to witness a paper.

Q. 22. State whether they had not called you in from the other room for the purpose of witnessing it?

A. It would be impossible for me to state positively this long time since.

Q. 23. After the paper was signed who left the room first—in which you all were—first?

A. Well, my impression is, that I went in and signed it, went into my own office, a small room, and they went out into the other room together, but where they went to, or which of them went out first, I cannot tell.

Mr. BOTTS: The question is, whether they left the room
910 before you?

A. I didn't leave at all; I went into my own little room and sat down and attended to my business.

Q. 24. By Mr. WILSON: How many rooms was your office composed of at that time?

A. I think only two, the large room and my little one.

Q. 25. In which room did this occur?

A. I would not be positive; my impression is that they stood in my room, and as I came in they asked me to witness a paper.

Mr. BOTTS: Which was your room, that they called your room?

A. The small room to the north of the main room.

Q. 26. And after they had signed it in there, they went out of your room?

911 A. Yes, sir; and I sat down and paid no more attention to it.

Q. 27. You didn't see what was done with that paper after you had witnessed it?

A. Nothing; I don't think they stayed in my presence at all; I think they went right out of my room, and I sat down and attended to my business.

Q. 28. Please look upon the paper now produced there from the custody of Mr. T. K. Wilson, dated the 28th March, 1874, and signed with the name of William Irvine, witnesses T. K. Wilson and H. J. Tilden, and state whether you identify that as the paper referred to or not?

A. All the way I can identify it is by my signature being upon it.

Q. 29. After looking at it and seeing the signatures and your own signature, you have no doubt this is the same instrument?

A. I have no doubt.

912 Q. 30. Is the signature to it of yours a genuine signature?

A. It is.

Q. 31. The signature of Wilson also is a genuine signature?

A. Yes, sir; that is Wilson's signature.

Mr. WILSON: I offer in evidence the paper referred to in the evidence and argued by counsel for both parties that a copy may be hereto annexed, the same as the original, being the same paper heretofore offered in evidence.

Cross-examination by Mr. BOTTS:

Q. 32. Mr. Tilden, did you ever hear Mr. Sinton say anything about his right or title to any portion of this Morgan mine; did you ever hear him say anything on the subject at all?

(Objected to by plaintiff's counsel as not being subject-
913 matter of cross-examination.

A. Yes, sir.

Q. 33. State, if you please, what you heard him say on the subject?

(Same objection by the plaintiff's counsel.)

A. Well, he made the remark to me that he had no interest in the mine.

Q. 34. Can you state where or about what time that was, and whether more than once?

(The same objection to each of the questions upon the same subject-matter.)

A. I think he said that two or three times to me, and it was prior to the execution of this agreement. I cannot tell you the exact time; during the litigation of those cases in the fourth district court here, one by Addison and others, against Irvine and Fair, and others against Irvine, I think. It is my impression I have not
914 looked at them, and it is so long I have most forgotten it.

Q. 35. Can you state in what connection it was that Mr. Sinton made those declarations to which you refer?

(Same objection by plaintiff's counsel.)

A. It was in connection with a conversation with him in regard to this mine and those suits that I have spoken of.

Q. 36. State what he said in that connection?

(Same objection by plaintiff's counsel.)

A. Well, in substance, he used to meet me on the street occasionally, and in the office. He would come in occasionally and want to know how we were getting along with the suit or suits, as the case might be, and I think I asked him once: "Have you any interest in this mine—my interest in it?" He says: "No interest at all." I am a friend of Irvine's, and the other parties have
915 not treated me well, and I take an interest to see how it is getting along.

Q. 37. At the time or about the time that this paper to which you have referred was executed, and either before or after your attesting or signing your name as a witness, was that paper read aloud by Mr. T. K. Wilson?

A. It was not in my presence or hearing.

Q. 38. It could not have been read—could it have been read in the room where you were without your hearing it?

A. Not while I was in, sir.

Q. 39. Was the door open between that room and the adjoining room?

A. I think it was.

Q. 40. Was the situation of those parties, Wilson, Irvine, and Sinton, during the interview, such that if that paper had
916 been read by Mr. Wilson in an ordinary voice, you would have heard it?

A. I think I should.

Q. 41. That is all, sir.

H. J. TILDEN.

Mr. WILSON: Shall we waive the signatures to this testimony?

Mr. BOTTS: I have no objection to waive the signature of Mr. Tilden. I propose to have my witnesses sign and have it written out.

917 *Certificate of Examiner.*

I further certify that the said depositions were, by agreement of counsel for the respective parties in said cause, taken down in shorthand, by S. C. Houghton, and were by him transcribed into their present form, and that the reading of the said depositions to said witnesses, and the signing thereof by them, were waived; and I have retained said depositions in my possession, for the purpose of presenting the same with my own hands to the court for which they were taken.

And I do further certify that I am not attorney nor of counsel for either or any of the parties to said action, nor in any way interested in the event of said cause.

In testimony whereof, I have hereunto set my hand this 25th day of September, A. D. 1877.

JOS. F. O'BEIRNE,
Examiner.

Endorsed: Filed Sept. 25, 1877. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

918 *Complainant's Exhibit No. 1, p. 13.*

"EXHIBIT A."

This agreement, made this 14th day of April, one thousand eight hundred and seventy-three, between William Irvine, of the city and county of San Francisco, State of California, party of the first part, and Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry D. Irvine, Charles T. Botts, William Hance and John C. Hays, of the city and county aforesaid, parties of the second part, witnesseth:

That whereas said William Irvine is in the possession and claims to be the owner of that certain gold-quartz mining claim, situate near Carson, on Carson Hill, in the county of Calaveras, State aforesaid, commonly known as the Morgan or Carson Creek Consolidated Mine. And whereas the said William A. Addison *et als.*, on the 5th day of March, 1872, obtained a judgment in the district court of the fourth judicial district of this State in their favor and against the said Irvine, wherein the court (among other things) adjudged and decreed that the plaintiffs therein have and recover of the defendant Irvine the possession of said mine and the premises hereinbefore mentioned, from which said judgment said Irvine, defendant, duly appealed to the supreme court of this State,
919 wherein the said appeal is now pending and undetermined.

And whereas, on the 7th day of October, 1872, the said John C. Hays *et als.* commenced an action in said district court of the fourth judicial district aforesaid against Irvine to recover the possession of said mine and the premises aforesaid, which cause is now pending and undetermined.

And whereas said parties of the first and second part are desirous of compromising and settling all litigation and adverse claims to said mine and premises.

Now, therefore, the said William Irvine, in consideration of the sum of one dollar, to him in hand paid, the receipt whereof is hereby acknowledged, and the covenants and agreements hereinafter set forth, doth for himself, his heirs, executors, administrators and assigns, covenant, grant, promise, and agree, to and with the parties of the second part, that he will make application for a United States patent to said above-described mine and premises, and give his time and attention to the procuring thereof, free of charge, and will take such steps in respect thereto as the said Irvine and Henry D. Bacon shall mutually agree upon, provided that the said
920 parties of the second part shall and do advance and pay to the said Irvine all expenses necessary to be incurred in applying for and procuring the said patent. It being expressly understood that in the steps to be taken and expenses incurred in the procuring of said patent, the said Irvine and Bacon shall have an equal voice, and that all the expenses incurred therefor, except for the time of said Irvine, shall be paid by the parties of the second part, and paid to said Irvine, as the same may be required, whether his application for said patent be finally granted or denied.

It is further mutually agreed that said Irvine and Bacon shall each use his best endeavors to sell said mine and premises, and that they may sell the same for such price and upon such terms as said Bacon and Irvine shall mutually agree upon. And upon a sale thereof, said Irvine hereby covenants and agrees to make, execute, and deliver to such purchaser or purchasers, a good and sufficient grant or conveyance which may be sufficient to transfer and vest in the grantee therein named any title which said Irvine now has or may at any time hereafter, prior to the execution and delivery of such

conveyance, acquire of, in, or to the above-described premises or any part thereof free and clear of all liens or incumbrances, made,
921 done, or suffered by the said Irvine.

It is further mutually agreed that in the event of a sale as above mentioned, that the proceeds arising therefrom, after deducting the cost and expenses thereof, shall be divided, apportioned, and paid as follows:

To one Murphy, minor, heir of Duncan W. Murphy, $\frac{38}{1792}$ parts thereof, or such other sum as he may be legally entitled to receive, and after making such payment the residue of said proceeds shall be divided equally, and one-half belong to and be paid to the said Irvine, and one-half belong to and be paid to the said Henry D. Bacon for the parties of the second part.

It is further mutually agreed and understood that in case the said Irvine and Bacon shall mutually agree to form a corporation before such sale is made as aforesaid, for the purpose of carrying on or selling said mine, that then the said Irvine shall convey all the interest he now has or may hereafter at any time prior to the execution and delivery of the conveyance, acquire of, in, or to the said premises above mentioned or any part thereof, free and clear of and from all liens or incumbrances made, done or suffered by the said Irvine to such corporation, and make, execute, and deliver thereto such grants, deeds or conveyances as may be sufficient there-
922 for; and if said Irvine and Bacon mutually agree so to do, said corporation shall be formed, and said conveyances made, within one year from the date hereof. And said Irvine further agrees that at the expiration of one year from the date hereof he will, upon the written request of said Bacon, execute and deliver to such corporation a grant or conveyance similar in all respects to the one above mentioned of said mine and premises; provided, that he has not at any time prior thereto conveyed said mine as hereinbefore mentioned.

And it is further mutually agreed, that in the event of the formation of a corporation, and conveyance to it as aforesaid, that the capital stock thereof shall be issued to the respective parties as follows, to wit:

First. There shall be issued to said Murphy $\frac{38}{1792}$ parts thereof, or such other amounts as he may be legally entitled to receive.

Second. That there shall be issued to H. J. Tilden the same number of shares as are issued to said Murphy.

Third. The residue thereof shall be divided equally, and one-half issued to the said Bacon for the parties of the second part hereto, and the other one-half to the said Irvine.

And it is hereby mutually and expressly agreed that at all
923 meetings of the stockholders of said corporation said Tilden shall cast the vote of said shares so issued to him as aforesaid, in such manner that the vote of said Irvine and the parties of the second part, or theholders of said capital stock, be equal; that is to say, the shares issued and held by said Tilden shall be held

and voted for by him in such manner as to neutralize the vote of said shares of stock held by said Murphy, whether voted by him or by other parties.

And it is further mutually agreed, that if the party of the first part hereto, or the parties of the second part, or either of them, shall acquire, by purchase or otherwise, the control of the said shares of stock so issued to said Murphy as aforesaid, then the party or parties acquiring the same shall, before voting or offering to vote them, or either of them, transfer and deliver to the other party hereto a sufficient number of their shares of said stock, so as to make the shares and votes of said Irvine and the votes and shares of said parties of the second part equal; provided, that the party entitled to receive said shares pay to the party transferring the same the same price per share as said party so transferring paid for the same.

That in all matters pertaining to the management or control of said property or corporation (if formed) said Irvine shall have
924 an equal voice and vote with the parties of the second part, and the parties hereto of the second part have equal voice and vote with said Irvine.

But it is mutually agreed that the profits arising from said mine and premises by a sale thereof, or otherwise, shall belong to and be devided by giving said —— Murphy $\frac{3}{17}\frac{8}{92}$ parts thereof, or such other portion as he may be entitled to, and said Irvine one-half of the residue thereof, and the parties of the second part the remaining one-half.

The said party of the first part further covenants and agrees to pay one-half of all expenses accruing on behalf of or in relation to said mine and premises, except the expenses attending the application for a patent therefor, as above mentioned.

And said Irvine further covenants and agrees that he has not made or suffered any deed, mortgage, lien, or other incumbrance for, upon, or against said mine or premises, or any part thereof; and that if any deed, mortgage, or lien, as aforesaid, has been made or suffered, or is now upon or against said premises, that he will forever save the parties of the second part hereto harmless therefrom; provided, and it is hereby expressly understood, that in the event of any suit being commenced for the recovery of said
925 mine, or any part thereof, by any parties other than those named in this agreement, that all expenses incurred in said action shall be borne equally by said Irvine and said parties of the second part.

And the parties of the second part, in consideration of the sum of one dollar, to them in hand paid, the receipt whereof is hereby acknowledged, and the covenants and agreements hereinbefore set forth to be kept and performed by the party of the first part; and as a full, final, and complete settlement of all conflicting claims to said mine and premises, do hereby each for himself, his heirs, executors, and administrators, covenant, grant, promise, and agree to and with

the party of the first part that they will dismiss, or caused to be dismissed and discontinued, the suit hereinbefore referred to and pending in the said fourth district court of the city and county of San Francisco upon the execution of this agreement.

And further covenant and agree that they will confess error in the suit hereinbefore referred to and now pending in the supreme court of this State, and permit a judgment therein to be entered reversing the judgment of the court below and directing said court to enter a decree therein in favor of the defendant William Irvine as aforesaid.

926 And further covenant and agree that in the event that said judgment should be affirmed in or by said supreme court that they, and each of them, will, on demand, convey to said Irvine all the right, title, and interest which they or either of them now have or may hereafter acquire at any time prior to such conveyance of, in, or to the said mine and premises, and every part thereof, free and clear of all mortgages, liens, or incumbrances done, made, or suffered by said parties of the second part, or either of them, and make, execute, and deliver to said Irvine sufficient conveyances therefor; which said mine and premises, when so conveyed, shall be held by said Irvine in the manner and for the uses and purposes, and upon the conditions set forth in this agreement.

And the parties of the second part further covenant and agree that if the supreme court of said State reverses said judgment and orders a new trial, that then said parties of the second part will cause said action to be at once dismissed and discontinued.

And further covenant and agree to advance and pay all expenses incurred and attending the application for and procuring a United States patent for said premises and mine, whether said patent shall be issued or not, and pay one-half of all other expenses accruing in behalf or in relation to said mine.

927 And said parties of the second part each for himself further covenants and agrees that he has not made or suffered any conveyance, lien, or other incumbrance upon or against any part or portion of said mine or premises above described, and that if any claim is made against or for said mine or premises by reason of any deed, mortgage, lien, or other incumbrance made, or act or thing done by either of the parties of the second part, or the plaintiffs in either of the suits above mentioned, that each of said parties for himself, and not for the others, will defend, pay, and satisfy, and forever save harmless therefrom the party of the first part to the extent of his individual acts and liabilities as aforesaid; provided that in the event of any suit being commenced for the recovery of said mine, or any part thereof, by any parties other than those claiming as aforesaid, by order or through the parties of the second part, or some one or more of them, or those named in said suit or this agreement, that the expenses of such actions shall be borne equally by the said Irvine and the parties hereto of the second part.

And it is further mutually agreed and understood by and between

the parties to this agreement that the said Bacon and Irvine shall have the entire management and control of said mine and
928 premises, either in selling or working the same and all other matters pertaining thereto, and that the sum of $10,000, and no more, may be expended in prospecting and working said mine; provided, that such further sum may be expended as said Bacon and Irvine may agree upon.

And it is further expressly agreed and understood by and between the parties to this agreement, that the same shall be so construed to be and is a full, complete, and final settlement and compromise of all matters in litigation, or otherwise, between the parties hereto, relative to the title to said mine or any part thereof, or the ownership or claim to said mine or premises.

A copy of the power of attorney to an agreement between Henry D. Bacon and William A. Addison and others, of the second part hereto, is hereto attached and marked "Exhibit A," and made a part and portion of this agreement.

In witness whereof, the said parties hereto have hereunto set their hands and seals on the day and year first above written.

WILLIAM IRVINE. [SEAL.]
CHAS. T. BOTTS. [SEAL.]
WILLIAM HANCE,
By his attorney-in-fact,
CHAS. T. BOTTS. [SEAL.]
H. D. BACON. [SEAL.]
929 HENRY P. IRNING. [SEAL.]
JOHN C. HAYS. [SEAL.]
By his attorney-in-fact,
WM. H. GLASCOCK.
WM. A. ADDISON. [SEAL.]
By his attorney-in-fact,
JNO. E. ADDISON.
FRANK L. COFFEE. [SEAL.]
JOHN COFFEE. [SEAL.]

Signed, sealed, and delivered in presence of—the names of Charles T. Botts and William Hance were interlined before the signing or execution hereof—

ANDREW J. COFFEE.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

On this 13th day of April, A. D. 1874, before me, E. V. Joice, a notary public, personally appeared Andrew J. Coffee, personally known to me to be the person whose name is subscribed to the annexed instrument as a witness thereto, who being by me duly sworn, deposes and says, that he resides in the city and county aforesaid; that he was present and saw William Irvine, Chas. T. Botts, H. D. Bacon, Henry P. Irving, Frank L. Coffee, and John Coffee, known to him to be the persons whose names are subscribed to the an-

nexed instrument, and they severally acknowledged that they executed the same; and at the same time also appeared Charles T. Botts, William H. Glascock, and John E. Addison, personally known to deponent to be the persons whose names are subscribed to the annexed instrument as the attorneys-in-fact, the said
930 Charles T. Botts, of William Hance; William H. Glascock, of John C. Hays and John E. Addison, of William A. Addison, and severally acknowledged that they respectively subscribed the names of William Hance, John C. Hays, and William A. Addison thereto as principals, and their respective names as attorneys-in-fact; and deponent further says that he subscribed his name thereto as a witness.

Witness my hand and official seal.

[SEAL.] E. V. JOICE, *Notary Public.*

"EXHIBIT A."

Whereas we, the undersigned, claim to own, in connection with Henry D. Bacon, undivided interests in that certain mineral lode, vein, or mining claim, situated in the county of Calaveras, State of California, and known as the "Carson Hill" or "Carson Creek" or "Morgan mine;" and whereas one William Irvine, of the city of San Francisco, claims to own said vein, lode, or mining claim, adversely to us and said Bacon; and whereas the said Irvine has expressed a desire to compromise the two conflicting claims to said lode or vein, by consolidating the said conflcting claims, so that we, the undersigned, the said Bacon and the said Irvine, may hereafter hold the said lode, vein, or mining claim as servants in
931 common, in such proportion as may be agreed on between the parties.

Now, for the purpose of facilitating such compromise, we, the undersigned, do each for himself, do hereby constitute and appoint the said Henry D. Bacon our true and lawful attorney, that is, the attorney of each of us, respectively, to treat with the said Irvine, and agree upon the terms of said compromise; and any contract that our said attorney may make with the said Irvine in the premises on our behalf shall be as binding on us, and each of us, as if made by us, and each of us, in our proper persons.

And the said Bacon is hereby authorized and empowered in our names, place, and stead to execute and deliver to the said Irvine, and to receive for us from the said Irvine all documents, deeds, and conveyances that may be needful and proper to carry into execution the power herein granted.

In witness whereof, we have, each for himself, hereunto set our hands and affixed our seals, this tenth day of December, A. D. 1872.

ANDREW J. COFFEE.

JOHN COFFEE. [SEAL.]
FRANK L. COFFEE. [SEAL.]
WM. A. ADDISON. [SEAL.]
JOHN C. HAYS. [SEAL.]
HENRY P. IRVINE. [SEAL.]

932 (Endorsed:) 1614. Compl't's Ex. No. 1. Copy agreement. Wm. Irvine with Henry D. Bacon *et al.* Dated April 14, 1873. Recorded at request of Wells, Fargo & Co., April 18th, 1874, at 9 o'clock a. m., in Book D of Agreements, pages 169, 170, 171,172, 173, 174, 175, 176, and 177. Records of Calaveras Co. J. A. Foster, recorder.

(Endorsed:) Filed Feb. 15, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, D. C.

933 *Complainant's Exhibit, No.* 2, (*p.* 2, *p.* 18, *p.* 216.)

This is to declare, that I, William Irvine, of San Francisco, California, am the owner of one undivided half of that certain gold-bearing quartz lode or mine, situated on Carson Hill, Calaveras county, California, and known familiarly as the Morgan mine, and that I hold said half interest, equally, for myself and R. H. Sinton, also of San Francisco, share and share alike; and I hereby promise and bind myself, my heirs and assigns, whenever said mine shall be sold, or otherwise disposed of, to account fully and truly to said Sinton, his heirs or assigns, for the one-half of all *net* proceeds of such *sale*, or other disposition of said half interest. All necessary expenses, including counsel fees, heretofore incurred, or that may hereafter be incurred, in and about the property, up to the time of such sale or other disposition thereof, to be first paid before division of such proceeds.

Witness my hand and seal, this 28th day of March, A. D. 1874.

WILLIAM IRVINE. [SEAL.]

Witnesses:

T. K. WILSON.
H. J. TILDEN.

934 (Endorsed:) 1614. Compl't's Ex. No. 2. Dunham *vs.* Irvine *et al.* Plaintiff's exhibit No. 2. J. F. O'B., ex'r. Filed Feb. 15, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y cl'k.

935 *Complainant's Exhibit No.* 3, (*p.* 22.)

The copy of letter to Fair from Sinton offered in evidence, (page 22,) and marked Exhibit No. 3, was read in evidence by Mr. Sinton, and appears upon page 34 of his deposition.

(Endorsed:) 1614. Compl't's Ex. No. 3. Filed Feb'y 15, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, dep'y cl'k.

936 *Complainant's Exhibit No.* 4, (*p.* 28.)

This indenture, made the eighth day of September, A. D. one thousand eight hundred and seventy-four, between R. H. Sinton, of the city and county of San Francisco, California, party of the first part, and George P. Ihrie, late United States army, now of said city and county of San Francisco, party of the second part, witnesseth:

That the said party of the first, for and in consideration of the sum of five thousand three hundred and sixteen dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, remise, release, and quit claim unto the said party of the second part and to his heirs and assigns forever, all of his right, title, and interest in and to that certain gold-bearing quartz lode or mine, situated in Calaveras county, California, on Carson Hill, and familiarly known as the "Morgan" mine or "Carson Creek Consolidated Company Mine." The interest hereby conveyed being an undivided one-quarter of the whole, denied to the party of the first by virtue of a declaration of trust, executed by William Irvine, also of said city and
937 county of San Francisco, and which declaration of trust is dated the 28th day of March, A. D. 1874, and witnessed by H. J. Tilden and T. K. Wilson, and deposited with and accepted by said T. K. Wilson in escrow according to the terms thereof. Together with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

(S'g'd) R. H. SINTON. [SEAL.]

Signed, sealed, and delivered in the presence of—(Note, words "an undivided one-quarter of the whole" interlined above
938 and noted before execution.

(S'g'd) D. K. SWIM.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this ninth day of September, in the year A. D. one thousand eight hundred and seventy-four, before me, D. K. Swim, a notary public in and for said city and county, personally appeared R. H. Sinton, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

[SEAL.] (Signed) D. K. SWIM,
Notary Public.

(Endorsed:) Deed. R. H. Sinton to Geo. P. Ihrie. Dated 8th Sept., 1874. Recorded at request of Wells, Fargo & Co., Sept., 12th, 1874, at 5 min. past 9 o'clock a. m., in Deed Book X, pages 28, 29, 30, records of Calaveras Co. J. C. Foster, recorder.

939 (Endorsed:) 1614. Compl't's Ex. No. 4. Filed 15 Feb., '78. L. S. B. Sawyer. By J. F. O'Beirne, d'p'y.

940 *Complainant's Exhibit No. 5, (p. 30.)—Quit Claim.*

This indenture, made the 29th day of June, in the year of our Lord one thousand eight hundred and seventy-five, between George P. Ihrie, late United States army, temporarily residing in New York city, party of the first part, and Sumner T. Dunham, banker, of the city, county, and State of New York, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of five thousand dollars, lawful money of the United States of America, to me in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quit claimed, and by these presents doth remise, release, and quit claim unto the said party of the second part, and to his heirs and assigns forever, all his right, title, and interest in and to all that certain gold-bearing quartz mine situated on Carson Hill, Calaveras county, California, and known as the "Morgan Mine," together with any and all shares of the capital stock of any incorporated mining company based upon said interests, to
941 gether with all and singular the tenements, hereditaments, and appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first-above written.

(S'g'd) GEORGE P. IHRIE. [SEAL.]

Sealed and delivered in the presence of—

(Signed) WILLIAM H. CLARKSON.
(Signed) CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

942 Be it remembered that on this 29th day of June, A. D. 1875, before me, Charles Nettleton, a commissioner of the State of California, in and for the State of California, in and

for the State of New York, residing in said city of New York, personally appeared George P. Ihrie, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 29th day of June, A. D. 1875.

[SEAL.] CHARLES NETTLETON,
Commissioner for California, in New York,
117 *Broadway, N. Y. City.*

Endorsed: W. F. & Co., 1845. Geo. P. Ihrie to L. T. Dunham, dated 29th June, 1875. Deed recorded at request of Wells, Fargo & Co., July 26th, A. D. 1876, at 4 o'clock p. m., in book "Z" of Deeds, pages 94 and 95, Records of Calaveras county. R. M. Redman, recorder.

(Endorsed:) 1614. Compl't's Ex. No. 5. Filed 15th Feb'y, 1878. L. S. B. Sawyor, cl'k. By J. T. O'Beirne, d'p'y cl'k.

943 *Complainant's Exhibit No. 6, (p. 30.)*

Article of Incorporation of the Morgan Mining Company.

Know all men by these presents, that we, the undersigned, have this day associated ourselves together for the purpose of incorporating under the laws of the State of California a *corporation*, to be known by the corporate name of The Morgan Mining Company.

And we hereby certify that the purpose for which this corporation is formed are: To sell, or work and develop, that mining property in the county of Calaveras, State of California, formerly known as the Carson Hill or Morgan Mine, it being the same property conveyed to William Irvine by letters patent of the United States, bearing date March ninth, A. D. eighteen hundred and seventy-four, recorded in the office of the county recorder of the said county of Calaveras, in Book W of Deeds, at pp. 554, 555, 556, 557, 558, and 559.

And for this purpose, to purchase adjacent lodes, construct, buy and sell mills, water-rights, and mill sites, flumes, timber lands;
to reduce ores, and to buy and sell the same, and to do all
944 other things that may be necessary and proper in or about the selling or developing of said property.

That its principal place of business shall be in San Francisco.

That the time of its existence shall be fifty (50) years from and after the date of its incorporation.

That the number of its directors or trustees shall be five (5), and that the names and residences of those who shall serve until the election of such officers and their qualifications are:

Names.	*Residences.*
CHARLES T. BOTTS,	Oakland;
WILLIAM IRVINE,	San Francisco;
ROBERT IRVINE,	San Francisco;
HENRY D. BACON,	Oakland;
THOMAS BROWN,	San Francisco.

That the capitol stock of this corporation shall be two millions of dollars ($2,000,000), divided into twenty thousand shares, of the par value of one hundred dollars ($100) each.

In witness whereof, we have hereunto set our hands and seals, this 12th day of March, A. D. 1875.

Signed and sealed in the presence of:

CH. T. BOTTES. [SEAL.]
WM. IRVINE. [SEAL].
945 ROBERT IRVINE. [SEAL.]
H. D. BACON. [SEAL.]
THOMAS BROWN. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this *twelfth* day of March, A. D. in the year one thousand eight hundred and seventy-five, before me, E. V. Joice, a notary public, personally appeared Chas. T. Botts, Wm. Irvine, Robert Irvine, H. D. Bacon, and Thomas Brown, known to me to be the persons whose names are subscribed to the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

Witness my hand and official seal.

[SEAL.] E. V. JOICE,
Notary Public.

(Endorsed:) Articles of Incorporation of the Morgan Mining Company. Filed in the office of the county clerk of the city and county of San Francisco, on the 12th day of March, 1875.
946 Wm. Harney, county clerk of said city and county. By John H. Harney, deputy county clerk. 1614. Compl't's Ex. No. 6. Filed 15 Febr'y, 1878. L. S. B. Sawyer, clerk. By J. F. O'Beirne, d'p'y.

947 *Complainant's Exhibit No.* 7, (*p.* 31.)

Know all men by these presents, whereas William Irvine, of the city and county of San Francisco, State of California, on the fourteenth day of April, one thousand eight hundred and seventy-three, made and entered into an agreement in writing with Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry P. Irving, Charles T. Botts, William Hance, and John C. Hays, whereby certain differences and claims respecting the quartz mining claim situate near Carson or Carson Hill, in the county of

Calaveras, State of California, commonly known as the Morgan or Carson Creek Consolidated Mine, were fully adjusted and settled, and the interests of the several parties above named set forth and determined; and whereas, in and by said agreement, it was provided, among other things, that said William Irvine should make application for the patent of the United States to said mining claim to be issued to him; and whereas, said Irvine has secured the United States patent for said mining claim under date of the ninth day of March, one thousand eight hundred and seventy-four,
948 and which said patent was recorded on the third day of August, one thousand eight hundred and seventy-four, at nine o'clock a. m., in book W, of Deeds, pp. 554 *et seg.*, Records of Calaveras county; and whereas, said agreement further provided that in case said parties should so agree a corporation should be formed under the laws of California and a conveyance should be made by said Irvine to such corporation, if formed, of all his right, title, and interest in said mining property, within one year from the date of said agreement; and whereas, said corporation has been formed under the laws of California by the corporate name of The Morgan Mining Company, the capital stock whereof is twenty thousand (20,000) shares of the par value of one hundred dollars ($100) each; and whereas, said Irvine has agreed to and with said Henry D. Bacon, acting for himself and the other parties in interest under said agreement, to make the conveyance mentioned in said agreement to said corporation; and whereas, said corporation has agreed to accept said conveyance and to issue to the parties in interest in consideration thereof its capital stock in such proportions and shares as are provided for in said agreement, and has agreed, and does hereby covenant with said Irvine to take notice of said agreement, and to be bound thereby, so far as the same relates
949 to the several rights and interests of the parties therein mentioned in said property; and said agreement is hereby referred to and made part of this indenture as fully to all intents and purposes as if the same had been set forth herein at full length.

Now this indenture witnesseth that the said William Irvine, for and in consideration of the premises, and of the assuming by said corporation of the terms of said agreement, and of its capital stock aforesaid to be issued as provided in said agreement, and of one dollar ($1) to him in hand paid by the said Morgan Mining Company at or before the ensealing and delivery of these presents, receipt whereof is hereby acknowledged, and in pursuance of the written request of said Henry D. Bacon heretofore made to him, has granted, and does hereby grant, to the said Morgan Mining Company, a corporation, as aforesaid, all that real property situated in Calaveras county, State of California, bounded and described as follows, to wit: Lot number forty-six (46), embracing a portion of sections thirteen (13) and fourteen (14), in township two (2) north, range thirteen (13) east, Mount Diablo meridian, in the Carson mining district, in the county of Calaveras, State of California, in

the district of lands subject to sale at Stockton, embracing
950 $(4\frac{28}{100})$ four acres and twenty-eight one hundred parts of an acre of land, more or less, and according to the returns on file in the General Land Office, bounded and described as follows, with magnetic variations at (16° 30′) sixteen degrees, thirty minutes. Beginning at post in stone mound in line of Morgan and Union mines; thence north thirty-two (32°) degrees east, three (3) chains to section line between sections thirteen and fourteen (13 and 14), in township two (2) north, range thirteen (13) east, Mount Diablo meridian, four (4) chains ninety-three (93) links to post in stone mound, from which the quarter section corner between said sections thirteen (13) and fourteen (14), bears north two degrees (2°) west at the distance of twenty-two (22) chains ninety (90) links; thence from said post south forty-two (42°) degrees east six (6) chains fifteen (15) links to post in stone mound on western boundary of survey number thirty-nine (39), patented to Gabriel K. Stevenot and others, with their claim on the Reserve mine; thence south thirty-three (33°) degrees west one (1) chain fifty-five (55) links to Live Oak tree fourteen (14) inches in diameter; thence south twenty-five (25°) west (1.14) one chain fourteen links to post situate at the southwest corner of said survey number thirty-nine (39), and at
the northwest corner of survey number forty-one (41) patented
951 to Gabriel K. Stevenot and William Jeffrey, with their claim on the Melones or Point Rock mine; thence south (35° 30′) thirty-five degrees thirty minutes west, (4.54) four chains fifty-four links to post at the southwest corner of said survey number forty-one (41); thence north forty-two degrees (42°) west, (1.50) one chain fifty links to section line between said sections thirteen (13) and fourteen (14), six (6) chains to post in stone mound; thence north thirty-two degrees (32°) east, two (2) chains (thirty-four (34) links to the place of beginning, containing $(4\frac{28}{100})$ four acres and twenty-eight one-hundredth parts of an acre, and being the lands for which the United States patent was issued to said William Irvine, dated the ninth day of March, one thousand eight hundred and seventy-four, and which patent is recorded in Calaveras county records the third day of August, one thousand eight hundred and seventy-four, in Book W of Deeds, pages 554 to 559.

In witness whereof, the said William Irvine has hereunto set his hand and seal, on this the ninth day of April, one thousand eight hundred and seventy-five.

(Signed) WILLIAM IRVINE. [SEAL.]

Signed, sealed, and delivered in the presence of—
D. K. SWIM.

952 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this ninth day of April, in the year A. D. one thousand eight hundred and seventy-five, before me, D. K. Swim, a notary public

in and for said city and county, personally appeared William Irvine, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

[SEAL.] D. K. SWIM,
Notary Public.

(Endorsed:) Dated April 9th, 1875. William Irvine to Morgan Mining Company. Conveyance. Recorded at request of C. T. Botts, April 12th, 1875, at 9 o'clock a. m., in Deed Book "X," pages 395, 396, 397, 398, records of Calaveras county. J. A. Foster, recorder. $3. W. H. L. Barnes. Filed with Morgan M. Co. April 22, 1875. W. G. Hughey, sec'y.

953 *Complainant's Exhibit No.* 8.

SAN FRANCISCO, CAL., *February 23d, A. D.* 1876.

MR. WILLIAM IRVINE.

SIR: I claim five thousand (5,000) shares of the capital stock of the Morgan Mining Company, being the one-half of the number of shares issued to you in consideration of your conveyance to said company, of the one undivided half, part of the quartz lode or mine, generally known as and called the Carson Hill or Morgan mine. I claim, as the successor in interest of Richard H. Sinton, and am subrogated to all his rights and interest in the premises, and under the agreements heretofore made between you and him respecting said mining property, and especially under a certain declaration of trust and agreement by you executed to said Sinton, dated March 28th, 1874.

I am ready to exhibit to you the assignment by which I derive title under Mr. Sinton.

Please render me an account of the expenses, including counsel fees, at any time incurred by you in and about the said mining property, up to the time you disposed of the same, to the Morgan Mining Company, and I am ready and offer to pay the one-
954 half thereof; I am also ready and offer to pay to you any and all assessments paid by you on said 5,000 shares; and also now offer and tender to you the assessment now due on the same; and I also request to you to transfer and assign to me the said number of shares aforesaid, that is to say, five thousand (5,000) shares.

The bearer of this is my agent, authorized by me to act in the premises.

Yours respectfully,

S. T. DUNHAM.
By his attorney-in-fact,
R. H. SINTON.

Memo.

A true copy of the above and foregoing was, on Feb'y 24th, 1876, personally delivered to Wm. Irvine by me, and he declined positively to make any statement whatever in regard to said stock, or to account for the same, or for any moneys by him expended in regard thereto, or to comply in any way with said notice.

A. A. SELOVER.

(Endorsed:) Demand. Dunham v. Irvine. Complainant's Exhibit No. 8. J. F. O'B., ex'r.

955 *Complainant's Exhibit No. 9.*

This is to declare that I, William Irvine, of San Francisco, California, am the owner of one undivided half of that certain gold-bearing quartz lode or mine situated on Carson Hill, Calaveras county, California, and known familiarly as the "Morgan" mine, and that I hold said half interest, equally for myself and R. H. Sinton, also, of San Francisco, share and share alike, and I hereby promise and bind myself, my heirs and assigns, whenever said mine shall be sold or otherwise disposed of to account fully and truly to said Sinton, his heirs or assigns, for the one-half of all *nett* proceeds of such sale, or other disposition of said half interest.

All necessary expenses, including counsel fees, heretofore incurred, or that may hereafter be incurred in and about the property up to the time of such sale or other disposition thereof, to be first paid before division of such proceeds.

Witness my hand and seal, this 28th day of March, A. D. 1874.

WILLIAM IRVINE. [SEAL.]

Witnesses:
T. K. WILSON.
H. J. TILDEN.

Endorsed: Copy Declaration. Wm. Irvine. Dunham *v.*
956 Irvine. Complainant Exhibit No. 9. J. F. O'B., ex'r.

957 *Complainant's Exhibit No. 10.—Memorandum.*

DEC. 6th, 1871.

After much delay and trouble I got Messrs. Barnes, Sam. Wilson, and Wm. Irvine together, at Barnes' office, Calif'a st., at 4 p. m., with a view to come to some definite understanding with Irvine about the tax title to the Morgan mine. Discussion between the three followed, when Mr. Irvine stated his ultimatum, viz: $5,000 cash, $15,000 guaranteed to be paid in 12 mos. from signing the required papers—all in gold coin. Whereupon Mr. Wilson wished to advise with A. A. Selover, in New York city, and meeting adjourned to Saturday, 9th inst., at 12 m., at same place.

SATURDAY, *Dec.* 9.

Mr. Irvine and myself attended Barnes' office, Cal'f'a st., at 12

m., and was informed, as from Mr. Barnes, that Mr. Wilson had had no advices from N. Y., and that the meeting must go over until 12 m., Monday next, 11th inst., at same place.

MONDAY, *Dec.* 11*th.*

Mr. Irvine and self attended Barnes' office, at 12 m., and were again advised, as on Saturday last, with the indefinite appointment, that when advices should be received from Mr. Selover, that
958 he, Mr. Barnes, will send us word for another appointment, whereupon we left to await his summons.

DEC'R 15.

Irvine and self met Messrs. Barnes and Wilson at request of former, at office of the latter. When, after considerable debate, Mr. Irvine stated his ultimatum, viz: $5,000 cash, bal. $15,000 within 1 year, guaranteed, which was accepted, conditionable, by Messrs. B. and Wilson, and we left with the understanding that the proper papers were forthwith to be made out for execution and payment, as above.

959 *Complainant's Exhibit No.* 11, (*p.* 119.)

SAN FRANCISCO, *Oct.* 1, 1872.

A. A. SELOVER, Esq., JAMES G. FAIR, Esq., THOMAS BROWN, Esq.

GENTLEMEN: On the 15th December last, I verbally agreed with Messrs. Samuel Wilson and W. H. L. Barnes, on your behalf, to sell my title to the Morgan mine on certain terms.

Not having heard from you or either of you since on the subject, I now respectfully notify you, and each of you, that I am still willing to carry out the terms of said agreement, but new litigation having arisen, I hereby notify you, and each of you, that if no more definite arrangements be made with me on or before the first day of November next, I shall consider said agreement made with me at the time referred to above as abandoned by you, and I shall not feel bound after said last-named date to abide by the same.

I am, most respect., yours,

WM. IRVINE.

(To A. A. Selover, Esq.)

960 (Endorsed:) 1614. Compl't's Ex. No. 11. Filed 15th Feb'y, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y.

961 *Complainant's Exhibit No.* 12, (*p.* 168, 197.)

Taxes to T. K. Wilson, July 9, '70	$123 50
Fees to T. K. Wilson	25 00
Traveling expenses to Mok Hill, San Andreas & Co., getting possession of property deed	47 75
Acknowledging power att'y	1 00
Copy of records, W. F. & Co.	13 00

Wages for man from August 19, '70, to Feb'y 19, 1871, 6 m.	$600 00
T. K. Wilson, retainer	100 00
	$910 25

Contra.

Cr. by cash	$150 00	
"	250 00	
		400 00
		$510 25

MARCH, 1871.

(Endorsed:) Compl't's Ex. No. 12. March 1st, 1871. Costs on the Morgan. 1614. Filed 15 February, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y cl'k.

962 *Comp's Exhibit No.* 13, (*p.* 193.)

July	9.	Cash to Wilson purchase of mine	$123 50
		" retainer's fee	25 00
	19.	John Douglas getting possession of mine, traveling expenses, and Co.	110 75
		Cash acknowledging power of att'y	2 00
Nov.	1.	copy of Cal. Co. Records, *C. O. D.*	23 00
		T. K. Wilson	100 00
Oct.	4.	costs in Cal. Co. court	44 75
Nov.	21.	certified copy of court papers	25 20
Dec.	28.	B. K. Thorne, sheriff's fees	26 88
1871.			
Jan'y	20.	T. K. Wilson	100 00
March	29.	John Douglas, pick and shovel	3 50
April	26.	T. K. Wilson	90 00
June	4.	expenses to San Andreas	67 50
July	20.	B. K. Thorne on writ. assistance	28 50
Nov.	1.	San Andreas and Carson	95 00
	18.	paid costs on suit	5 00
1872.			
June	4.	redemption of mine	107 50
Dec.	19.	taxes for 1878	6 60
1873.			
Jan'y	10.	T. K. Wilson	100 00
	26.	"	100 00
April	15.	"	100 00
	19.	U. S. office, paid $50.00; ½ of this	25 00
		extra work in land office, $12.50	6 25
	23.	E. A. Beauvias for surveying, $45.00	22 50
		to Carson for putting up notices, $76.50	38 25
May	15.	to T. K. Wilson	100 00

963

1873.			
May	23.	Cash Wells, Fargo & Co. charges on papers, $2.00	$1 00
		T. K. Wilson to Sac. to dismiss suits	100 00
June	2.	" " " "	110 00
July	20.	to independent newspaper, $15.00	7 50
		to H. W. Weaver, $40.00	20 00
	23.	trip to Carsons about patent, $64.00	32 00
June	23.	expenses for sundries, $80.00	40 00
Aug.	7.	to Hall as witness	12 50
Oct	28.	T. K. Wilson	100 00
		expenses to Stockton and Sac. about papers, $40.00	20 00
Nov.	22.	T. K. Wilson	100 00
Dec.	2.	"	100 00
	11.	"	60 00
	15.	trip to San Andreas, $65.00	32 50
	24.	T. K. Wilson	100 00
1874.			
Jan'y	14.	telegraphing, $3.55	1 78
	24.	" to Washington, $6.05	3 02
March	24.	order R. A. Fish, $200.00	100 00
August	7.	recording patent, $6.00	3 00
		expenses from S. A. to Carson, $12.00	6 00
		paid Blake for report, $75.00	37 50
		paid keeper at Morgan mine from July 19, 1870, to April 14, 1873, making 853 days' time, at $3.00	2,559 00
		paid keeper of Morgan mine, from April 14, 1873, to Sept. 14, 1874, making 442 days' time, at $3.00, making this amount $1,326.00	663 00
			$5,686 48

964

To interest at one per cent. per month, from July 9th, 1870, to Sept. 9th, 1874, 4 years and two months, making $2,843.20, averaging this at half time	1,421 60
	$7,108 08

(Endorsed:) 1814. Compl't's Ex. No. 13. Cash expenses paid on Morgan mine by Wm. Irvine. Filed 15th Feb'y, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y.

965 *Complainant's Exhibit No.* 14, (*p.* 206.)

Power of Attorney.

Know all men by these presents, that I, Sumner T. Dunham, of city, county, and State of New York, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Richard H. Sinton, of San Francisco, State of California, my true and lawful attorney, for me, and in my name, place, and stead, to take charge of all my interests in and to that certain gold-bearing quartz mine, situated on Carson Hill, Calaveras county, California, and familiarly known as the "Morgan mine," and of any and all shares of the capital stock of any incorporated company based thereon, to which I may be legally entitled. To represent me in all suits at law, for the recovery and protection of my said interests in any court of competent jurisdiction. To compound and compromise all disputes relative thereto. To appoint a trustee and make a deed of trust for such interests jointly with any other person or persons owning interests in the same, for the mutual protection of one another. To bargain, sell, and convey all of my said interests for such sum and upon such terms as my said attorney shall
966 deem fit. To make contracts and agreements touching the same, and to those ends to make, execute, and deliver all necessary instruments in writing, under seal or otherwise, provided nothing herein contained shall be construed to authorize my said attorney to [incur] on my account any indebtedness of any kind beyond what the parties may accept, said interests as responsible for S. T. D., giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof, I have hereunto set my hand and seal, the twenty-ninth day of June, in the year one thousand eight hundred and seventy-five.

(S'g'd) SUMNER T. DUNHAM. [SEAL.]

Sealed and delivered in the presence of—

(Signed) WILLIAM H. CLARKSON.

" CHARLES NETTLETON.

967 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this 29th day of June, A. D. 1875, before me, Charles Nettleton, a commissioner of the State of California, in and for the State of New York, residing in said city of New York, personally appeared Sumner P. Dunham, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 29th day of June, A. D. 1875.

[SEAL.] (Signed) CHARLES NETTLETON,
Commissioner for California in New York,
117 *Broadway, N. Y. City.*

(Endorsed:) L. T. Dunham to R. H. Sinton. Dated 29th June, 1875. Power of attorney.

(Endorsed:) 1614. U. S. circuit court Cal. Filed 15 Febr'y, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, dep'y cl'k. Compl't's Ex. No. 14.

968 *Complainant's Exhibit No.* 16, (*p.* 233.)

[Int rev. stamp cancelled.]

SAN FRANCISCO, *Novem.* 15, 1871.

The Bank of California pay to Wm. Irvine or order nine hundred and fifty dollars.

[First national San Francisco gold seal.]

$9.50 THO. BROWN, *Trustee.*

(Endorsed:) Wm. Irvine. I. H. & Co. First National San Francisco Gold Bank. Filed Feb'y 15, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y cl'k.

969 *Complainant Exhibit No.* 17, (*p.* 233.)

[Int. rev. stamp cancelled.]

SAN FRANCISCO, *Novem.* 20, 1871.

The Bank of California pay to Wm. Irvine account Carson Creek Mine or order, one hundred and ninety eight $\frac{50}{100}$ dollars.

[First national San Francisco gold stamp.]

$198.50. THO. BROWN, *Trustee.*

(Endorsed:) Wm. Irvine. I. H. & Co. First National San Francisco Gold Bank. Filed Feb'y 15, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y.

970 *Complainant's Exhibit No.* 18, (*p.* 234.)

I. K. Wilson	$100 00
Two trips to San Andreas	50 00
7½ months' services keeping mine	750 00
Taxes and redemption	107 70
Acknowledging deed	1 00
Expenses to San Andreas and C. W. I.	82 30
Fee to pay John Hardy	50 00
Taxes paid for 1869 and 1870 by W. Irvine on $150	7 50
	$1,148 50

Attached hereto in pencil, as follows:

Wilson	$100 00
Douglass	700 00
Fox	82 85
Hardy	50 00
18 per cent. tax	41 42
	$974 27

Paid by Mr. Fair to—

H. P. Barber	250 00
Exp's of man to Calaveras Co., to record on Murphy's deed	48 50

971 (Endorsed:) A Carson Creek G. & T. M. Co. Copy. Particulars of Wm. Irvine's claim for disbursements to this time, (Nov'r 20, '71.) Nov. 20, '71. Original handed to Mr. Brown by me this Nov. 20, '71. Mr. Brown had previously handed me a ch'k for $950, payable to W. Irvine or order, and he now handed me one payable in like manne rfor the bal. within acct. $198.50, making within $1,148.50. Both of these checks were this day handed by me to Wm. Irvine in settlement of within claim. J. H. D. 1614. Exhibit No. 18, compl't's. Filed 15 Feb'y, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, dep'y.

972 *Complainant's Exhibit No.* 19, (*p.* 248.)

Identical with Exhibit No. 1. q. v.

(Endorsed:) 1614. Dunham *vs.* Irvine. Complainant's Exhibit No. 19. Filed 15 Feb'ry, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y.

973 *Complainant's Exhibit "A."*

This agreement, made this 14th day of April, one thousand eight hundred and seventy-three, between William Irvine, of the city and county of San Francisco, State of California, party of the first part, and Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry P. Irving, Chas. T. Botts, William Hance, and John C. Hays, of the city and county aforesaid, parties of the second part, witnesseth: that whereas said William Irvine is in the possession, and claims to be the owner of that certain gold-quartz mining claim, situate near Carson, on Carson Hill, in the county of Calaveras, State aforesaid, commonly known as the Morgan or Carson Creek Consolidated Mine.

And whereas the said William A. Addison *et als.*, on the 5th day of March, 1872, obtained a judgment in the district court of the fourth judicial district of this State in their favor and against the said Irvine, wherein the court (among other things) adjudged and decreed that the plaintiffs therein have and recover of the defend-

ant Irvine the possession of said mine, and the premises
974 hereinbefore mentioned, from which said judgment said Irvine, defendant, duly appealed to the supreme court of this State, wherein the said appeal is now pending and unde[te]rmined.

And whereas, on the 7th day of October, 1872, the said John C. Hays *et als.* commenced an action in said district court of the fourth judicial district aforesaid against Irvine to recover the possession of said mine and the premises aforesaid, which cause is now pending and undetermined.

And whereas said parties of the first and second part are desirous of compromising and settling all litigation and adverse claims to said mine and premises:

Now, therefore, the said William Irvine, in consideration of the sum of one dollar, to him in hand paid, (the receipt whereof is hereby acknowledged,) and the covenants and agreements hereinafter set forth, doth for himself, his heirs, executors, administrators, and assigns, covenant, grant, promise, and agree to and with the parties of the second part that he will make application for a United States patent to said above-described mine and premises, and give his time and attention to the procuring thereof, free of charge, and will take such steps in respect thereto as the said Irvine and Henry D. Bacon shall mutually agree upon, provided that the said
975 parties of the second part shall and do advance and pay to the said Irvine all expenses necessary to be incurred in applying for and procuring the said patent. It being expressly understood that in the steps to be taken, and the expenses incurred in the procuring of said patent, the said Irvine and Bacon shall have an equal voice, and that all the expenses incurred therefor, except for the time of said Irvine, shall be paid by the parties of the second part, and paid to the said Irvine as the same may be required, whether his application for said patent be finally granted or denied.

It is further mutually agreed that said Irvine and Bacon shall each use his best endeavors to sell said mine and premises, and that they may sell the same for such price and upon such terms as said Bacon and Irvine shall mutually agree upon, and upon a sale thereof said Irvine hereby covenants and agrees to make, execute and deliver to such purchaser or purchasers a good and sufficient grant, or conveyance, which may be sufficient to transfer and vest in the grantee therein named any title which said Irvine now has, or may at any time hereafter, prior to the execution and delivery of such conveyance, acquire, of, in or to the above-described premises, or any part thereof, free and clear of all lines or incumbrances, made, done or suffered by the said Irvine.

976 It is further mutually agreed that, in the event of a sale as above mentioned, that the proceeds arising therefrom, after deducting the cost and expenses thereof, shall be divided, apportioned, and paid as follows. To one Murphy, minor, heir of Duncan W. Murphy, thirty-eight seventeen hundred and ninety-two $\frac{38}{1792}$

parts thereof, or such other sum as he may be legally entitled to receive, and after making such payment the residue of such proceeds shall be divided equally, and one-half belong to, and be paid to, the said Irvine, and one-half belong to, and be paid to, the said Henry D. Bacon for the parties of the second part.

It is further mutually agreed and understood that, in case the said Irvine and Bacon shall mutually agree to form a corporation before such sale is made as aforesaid, for the purpose of carrying on or selling said mine, that then the said Irvine shall convey all the interest he now has, or may hereafter, at any time prior to the execution and delivery of the conveyance, acquire, of, in, or to the said premises above mentioned, or any part thereof, free and clear of, and from all lines or incumbrances made, done or suffered by the said Irvine to such corporation, and make, execute, and deliver thereto such grants, deeds or conveyances as may be sufficient therefor, and if said Irvine and Bacon mutually agree so to do,
977 said corporation shall be formed, and said conveyances made within one year from the date hereof.

And said Irvine further agrees, at the expiration of one year from the date hereof, he will, upon the written request of said Bacon, execute and deliver to such corporation a grant or conveyance similar in all respects to the one above mentioned of said mine and premises: provided, that he has not at any time prior thereto conveyed said mine as hereinbefore mentioned.

And it is further mutually agreed that in the event of the formation of a corporation and conveyance to it as aforesaid, that the capital stock thereof shall be issued to the respective parties as follows, to wit:

First. There shall be issued to said Murphy thirty-eight seventeen hundred and ninety-two $\frac{38}{1792}$ parts thereof, or such other amounts as he may be legally entitled to receive.

Second. That there shall be issued to H. J. Tilden the same number of shares as are issued to said Murphy.

Third. The residue thereof shall be divided equally, and one-half issued to the said Bacon for the parties of the second part hereto, and the other one-half to the said Irvine.

978 And it is hereby mutually and expressly agreed that at all meetings of the stockholders of said corporation said Tilden shall cast the vote of said shares so issued to him as aforesaid in such manner that the vote of said Irvine and the parties of the second part, or the holders of said capital stock, shall be equal: that is to say, the shares issued and held by said Tilden shall be held and voted by him in such manner as to neutralize the vote of said shares of stock held by said Murphy, whether voted by him or by other parties.

And it is further mutually agreed that if the party of the first part hereto, or the parties of the second part, or either of them,

shall acquire by purchase or otherwise the control of the said shares of stock so issued to said Murphy as aforesaid, then the party or parties acquiring the same shall, before voting or offering to vote them, or either of them, transfer and deliver to the other party hereto a sufficient number of their shares of said stock so as to make the shares and votes of said Irvine, and the votes and shares of said parties of the second part, equal; provided, that the party entitled to receive said shares pay to the party transferring the same *the same* price per share as said party so transferring paid for the same.

979 That in all matters pertaining to the management or control of said property or corporation (if formed) said Irvine shall have an equal voice and vote with the parties of the second part, and the parties hereto of the second part have an equal voice and vote with said Irvine.

But it is mutually agreed that the profits arising from said mine and premises, by a sale thereof, or otherwise, shall belong to and be divided by giving said Murphy thirty-eight seventeen hundred and ninety-two ($\frac{38}{1792}$) parts thereof, or such other portion as he may be entitled to, and said Irvine one-half of the residue thereof, and the parties of the second part the remaining one-half.

The said party of the first part further covenants and agrees to pay one-half of all expenses accruing on behalf of or in relation to said mine and premises, excepting the expenses attending the application for a patent therefor, as above mentioned.

And said Irvine further consents and agrees that he has not made or suffered any deed, mortgage, lien, or other incumbrance for, upon, or against said mine or premises, or any part thereof; and that if any deed, mortgage, or lien as aforesaid has been made or suffered, or is now upon or against said premises, that he

980 will forever save the parties of the second part hereto harmless therefrom: Provided, and it is hereby expressly understood, that in the event of any suit being commenced for the recovery of said mine, or any part thereof, by any parties other than those named in this agreement, that all expenses incurred in said action shall be borne equally by said Irvine and said parties of the second part.

And the said parties of the second part, in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and the covenants and agreements hereinbefore set forth to be kept and performed by the party of the first part, and as a full, final, and complete settlement of all conflicting claims to said mine and premises, do hereby, each for himself, his heirs, executors, and administrators, covenant, grant, promise, and agree to and with the party of the first part that they will dismiss, or cause to be dismissed and discontinued, the suit hereinbefore referred to and pending in the said fourth district court of the city and county of San Francisco, upon the execution of this agreement.

And further covenant and agree that they will confess error in the suit hereinbefore referred to, and now pending in the supreme court of this State, and permit a judgment therein to be
981 entered reversing the judgment of the court below, and directing said court to enter a decree therein in favor of the defendant, William Irvine, as aforesaid.

And further, covenant and agree that in the event that said judgment should be affirmed in or by said supreme court that they and each of them will, on demand, convey to said Irvine all the right, title, and interest which they, or either of them, now have, or may hereafter acquire at any time prior to such conveyance, of, in, or to the said mine and premises and every part thereof, free and clear of all mortgages, liens, or incumbrances done, made, or suffered by said parties of the second part, or either of them, and make, execute, and deliver to said Irvine sufficient conveyances therefor, which said mine and premises, when so conveyed, shall be held by said Irvine in the manner and for the uses and purposes and upon the conditions set forth in this agreement.

And the parties of the second part further covenant and agree that if the supreme court of said State reverses said judgment and orders a new trial, that then said parties of the second part will cause said action to be at once dismissed and discontinued.
982 And further covenant and agree to advance and pay all expenses incurred and attending the application for and procuring a United States patent for said premises and mine, whether said patent shall be issued or not, and pay one-half of all other expenses accruing in behalf or in relation to said mine.

And said parties of the second part, each for himself, further covenants and agrees that he had not made or suffered any conveyance, lien, or other incumbrance upon or against any part or portion of said mine or premises above described; and that if any claim is made against or for said mine or premises by reason of any deed, mortgage, lien, or other incumbrance made or act or thing done by either of the parties of the second part, or the plaintiffs, in either of the suits above mentioned, that each of said parties, for himself and not for the others, will defend, pay, and satisfy and forever save harmless therefrom the party of the first part to the extent of his individual acts and liabilities as aforesaid; provided that in the event of any suit being commenced for the recovery of said mine, or any part thereof, by any parties other than those claiming as aforesaid, by, under, or through the parties of the second part, or some one or more of them, or those named in said suit, or this agreement, that the expenses of such actions shall
983 be borne equally by the said Irvine and the parties hereto of the second part.

And it is further mutually agreed and understood, by and between the parties to this agreement, that the said Bacon and Irvine shall have the entire management and control of said mine and premises, either in selling or working the same, and all other matters per-

taining thereto, and that the sum of two thousand dollars, and no more, may be expended in prospecting and working said mine, provided that such further sum may be expended as said Bacon and Irvine may agree upon.

And it is further expressly agreed and understood, by and between the parties to this agreement, that the same shall be so construed to be, and is, a full, complete, and final settlement and compromise of all matters in litigation, or otherwise, between the parties hereto, relative to the title to said mine, or any part thereof, or the ownership or claim to said mine or premises.

A copy of the power of attorney and agreement between Henry D. Bacon and William A. Addison and others, of the second part hereto, is hereto attached and marked Exhibit "A," and made a part and portion of this agreement.

In witness whereof, the said parties hereto have hereunto
984 set their hands and seals, on the day and year first above written.

WM. IRVINE. [SEAL.]
CHAS. T. BOTTS. [SEAL.]
WILLIAM HANCE. [SEAL.]
By his attorney-in-fact,
CHAS. T. BOTTS.
H. D. BACON. [SEAL.]
HENRY P. IRVINE. [SEAL.]
JOHN C. HAYS. [SEAL.]
By his attorney-in-fact,
WM. H GLASCOCK.
WM. A. ADDISON. [SEAL.]
By his attorney-in-fact,
JNO. E. ADDISON.
FRANK L. COFFEE. [SEAL.]
JOHN COFFEE. [SEAL.]

Signed, sealed, and delivered in the presence of—

(The names of Charles T. Botts and William Hance were interlined before the signing or execution hereof.)

ANDREW J. COFFEE.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this 13th day of April, A. D. 1874, before me, E. V. Joice, a notary public, personally appeared Andrew J. Coffee, personally known to me to be the person whose name is subscribed to the annexed instrument as a witness thereto, who being by me duly sworn, deposes and says, that he resides in the city and county aforesaid, that he was present and saw William Irvine,
985 Chas. T. Botts, H. D. Bacon, Henry P. Irvine, Frank L. Coffee, and John Coffee, known to him to be the persons

whose names are subscribed to the annexed instrument, and they severally acknowledged that they executed the same; and at the same time also appeared Charles T. Botts, William H. Glascock, and John E. Addison, personally known to deponent to be the persons whose names are subscribed to the annexed instrument as the attorneys-in-fact—the said Charles T. Botts, of William Hance, William H. Glascock, of John C. Hays, and John E. Addison, of William A. Addison, and severally acknowledged that they respectively subscribed the names of William Hance, John C. Hays, and William A. Addison thereto, as principals, and their respective names as attorneys-in-fact; and deponent further says that he subscribed his name thereto as a witness.

Witness my hand and official seal.

[SEAL.] E. V. JOICE, *Notary Public.*

EXHIBIT "A."

Whereas we, the undersigned, claim to own, in connection with Henry D. Bacon, undivided interests in that certain mineral lode, vein, or mining claim, situate in the county of Calaveras,
986 State of California, and known as the "Carson Hill" or "Carson Creek" or "Morgan mine;" and whereas one William Irvine, of the city of San Francisco, claims to own said vein, lode, or mining claim adversely to us and said Bacon; and whereas the said Irvine has expressed a desire to compromise the two conflicting claims to said lode or vein by consolidating the said conflicting claims, so that we, the undersigned, the said Bacon and the said Irvine, may hereafter hold the said lode, vein, or mining claim as tenants in common, in such proportion as may be agreed on between the parties.

Now, for the purpose of facilitating such compromise, we, the undersigned, do each for himself hereby constitute and appoint the said Henry D. Bacon our true and lawful attorney, that is, the attorney of each of us respectively, to treat with the said Irvine, and agree upon the terms of said compromises, and any contract that our said attorney may make with the said Irvine in the premises on our behalf, shall be as binding on us, and each of us, as if made by us and each of us in our proper persons.

And the said Bacon is hereby authorized and empowered in our names, place, and stead to execute and deliver to the said Irvine, and to receive for us from the said Irvine all documents,
987 deeds, and conveyances that may be needful and proper to carry into execution the power herein granted.

In witness whereof, we have each for himself hereunto set our hands and affixed our seals, this tenth day of December, A. D. 1872.

ANDREW J. COFFEE.

JOHN COFFEE. [SEAL.]
FRANK L. COFFEE. [SEAL.]
WM. A. ADDISON. [SEAL.]
JOHN C. HAYS. [SEAL.]
HENRY P. IRVING. [SEAL.]

(Endorsed:) Copy of argument. Wm. Irvine with Henry D. Bacon *et al.* Dated April 14, 1873. Recorded at request of Wells, Fargo & Co., April 18th, 1874, at 9 o'clock a. m., in Book D, of Agreements, pages 169, 170, 171, 172, 173, 174, 175, 176, and 177. Records of Calaveras Co. J. A. Foster, recorder.

988 In the District Court of the Fifteenth Judicial District in and for the City and County of San Francisco, State of California.

GEORGE P. IHRIE, Pl'ff, *vs.* WILLIAM IRVINE, Def't.

Now comes the defendant, and for answer to the plaintiff's complaint herein—

Denies that said R. H. Sinton, named in the complaint, was, on the 28th day of March, 1874, or at any time prior thereto, or at any time since said 28th day of March, 1874, or ever was, the owner of an undivided one-fourth part of that certain gold-bearing quartz lode or mine, situated on Carson Hill, Calaveras county, California, and known familiarly as the "Morgan mine," described in the complaint of plaintiff, or any part or portion thereof.

Denies that he, defendant, ever held the title to said one-fourth of said mine, or any part or portion thereof, in trust for said R. H. Sinton, or his heirs or assigns, or any or either of them.

Denies that defendant had no beneficial interest therein, but avers that he, during all the time referred to in the com-
989 plaint, was, and now is, the legal and equitable owner in fee and in the possession thereof.

Denies that on the 8th day of September, 1874, or at any other time, the said Sinton, by deed or otherwise, granted, sold, or conveyed to plaintiff, or his heirs or assigns, one-fourth or any interest or part of said mine or premises, but admits that he executed a deed to plaintiff purporting to convey one-fourth interest therein.

Denies that defendant had actual or any knowledge, or that he had notice of the execution, delivery, or recording of said deed prior to the recording thereof.

Denies that plaintiff, by virtue of said deed, or at all, succeeded to, or that he is the successor in interest of said Sinton of, in, or to an equal undivided one-fourth part or any part of said mine or premises.

Denies that plaintiff, by virtue of said deed, or at all, became, or that he is the owner or entitled to the possession of one-fourth or any part of said mine or premises.

Denies that defendant, without just cause or reasonable excuse, refused or neglected to make or execute a deed of conveyance of said interest in said mine to plaintiff, but avers that he had a good and valid reason for not executing the same, as hereinbefore and hereinafter set forth.

990 The defendant on information and belief denies that plaintiff was ever offered $25,000 in gold coin or any other sum

of money whatever for the said one undivided one-fourth of said mine.

Denies that the sum of $25,000 in gold coin, or any other sum of money, was lost to the plaintiff by reason of the defendant refusing or neglecting to execute a deed of one-fourth, or any part of said mine, to plaintiff, or at all.

Denies that the plaintiff ever informed the defendant that a failure by him to execute said deed to plaintiff would deprive the plaintiff of the opportunity of accepting the pretended offer or of being paid the said sum of $25,000 in gold coin or any other currency, or any other sum whatever.

Denies that the alleged statements of plaintiff to defendant in regard to the offer of $25,000 for one-fourth of said mine is true.

Defendant avers that he is now and has been for over one year last past the owner of an undivided one-half of said mine and premises described in the complaint, less $\frac{1}{192}$ parts thereof and no more, but denies that he now does or ever did hold in trust for the plaintiff one undivided one-fourth part or any part or portion thereof.

And denies that plaintiff now is, or ever was, the owner or
991 entitled to one-fourth or any part or portion of said mine or premises.

Denies that the plaintiff in consequence, or by reason of the refusal of the defendant to execute the said deed, or at all, was or has been damaged to the amount of $25,000 gold coin, or any other sum or amount of money whatever.

And for a further answer defendant avers that on the 14th day of April, 1873, several suits were pending in the district and supreme courts of this State against said Irvine to recover the possession of said mine by William A. Addison and others, and that for the purpose of settling and compromising said suits and matters in dispute, an agreement was on that day entered into between said Irvine and said parties claiming an adverse interest in said mine, to wit: Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry P. Irving, Charles T. Botts, William Hance, and John C. Hays, whereby it was mutually agreed that said Irvine should procure a U. S. patent for said mine, and that upon receiving said patent, said Irvine and Henry D. Bacon, acting for the other parties, should use their best endeavors to sell said mine and prem-
992 ises, and upon the sale thereof said Irvine agreed to execute a deed therefor to the purchaser.

And it was thereby further agreed, that in case said mine should not be sold within one year upon the request of Bacon, that a corporation should be formed for the purpose of carrying on and selling said mine, and upon the formation of such corporation that said Irvine should convey said mine to said corporation so formed.

That no sale has been made, but said corporation has been duly organized and formed under the laws of this State, and has duly demanded of said Irvine a deed therefor.

That said corporation has been formed for the purpose of

working and selling said mine for the mutual benefit of all parties interested therein, and that it will be to the interest and benefit of all owners of said mine to convey the same to said corporation. That if this court enjoins the conveyance thereof to said corporation it will work irreparble injury and damage to the defendant and said parties named in said agreement.

That said agreement provided and stipulates that said Irvine should hold the title, and with the advice of said Bacon control said mine until the same was sold, or the corporation formed
993 as aforesaid and mine conveyed to it by Irvine, and in the event of a sale or profits being derived from said mine, the proceeds of such sale, or the profits received, were to be divided among the parties in interest in proportion to their respective shares thereof. That said Irvine has fully kept and performed all the conditions of said agreement on his part.

That at the time of the making and execution of the agreement aforesaid, said R. H. Sinton had actual knowledge and notice of the same, and made no objection thereto, and expressly disclaimed any interest in said mine.

That said agreement was duly acknowledged, and on the 18th day of April, 1874, duly recorded in the office of the county recorder of Calaveras county.

That said plaintiff long prior to the date of the alleged deed to him by said Sinton, and long prior to his claiming, or of his having any interest therein, had due notice of and well knew of the agreement aforesaid.

The defendant, for a further answer, avers, that the pretended claim or interest of said Sinton is founded and based wholly upon the following statement or declaration, to wit: "This is to declare that I, William Irvine, of San Francisco, California, am the owner of one undivided half of that certain gold-bearing quartz lode
994 or mine situated on Carson Hill, Calaveras county, California, and known familiarly as the Morgan mine, and that I hold said half interest equally for myself and R. K. Sinton, also of San Francisco, share and share alike; and I hereby promise and bind myself, my heirs and assigns, whenever said mine shall be sold or otherwise disposed of, to account fully and truly to said Sinton, his heirs or assigns, for the one half of all *net* proceeds of such sale or other disposition of said half interest.

All necessary expenses, including counsel fees heretofore incurred, or that may hereafter be incurrred, in and about the property up to the time of such sale or other disposition thereof to be first paid before division of such proceeds.

Witness my hand and seal this 28th day of March, A. D. 1874.

(Signed) WILLIAM IRVINE. [SEAL.]

Witness:

T. K. WILSON.

H. J. TILDEN.

That no valuable or any consideration was ever paid or given by said Sinton, or anyone else, to said Irvine for or on account of said declaration aforesaid, and that said Sinton never paid or promised to pay anything therefor, nor did he ever pay or promise to
995 pay anything whatever for said alleged or any interest in said mine.

That said declaration was signed by the defendant without any consideration whatever therefor moving from the plaintiff or any one else to the defendant. That the said declaration was never delivered to the said Sinton, or any one for him, or to the plaintiff, but that the defendant left the same with T. K. Wilson in escrow, with instructions not to deliver or surrender the same to Sinton or any one else, except upon the decease of defendant, and that the same has so remained with T. K. Wilson ever since its execution.

That the object and reason of said declaration was that the defendant intended and desired to make a present to said Sinton if he, the defendant, sold said mine for a large consideration, and for no other reason or purpose whatever, and defendant being, on the 28th day of March, 1874, about to start for the Atlantic States, desired to, and did, make said declaration, so that in the event of his death his wishes and desires as above set forth would be carried out.

That the defendant has incurred and expended large sums of money in, upon, and for said property during the time he has been the owner thereof, and in litigation and counsel fees about the said mine and property, to wit, the sum of about twenty thousand dollars gold coin.

996 That said Sinton nor said plaintiff has never paid or offered to pay to defendant any part or portion of said expenses.

That a copy of the agreement above referred to, between William Irvine, Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry P. Irving, Charles T. Botts, William Hance, and John C. Hays is hereto annexed, and marked Exhibit "A," and made a part of this answer.

Wherefore defendant prays that the order made by this court restraining the defendant from conveying said mine be vacated, and the prayer of plaintiff's complaint denied, and that the declaration set out in the answer be declared null and void, and that defendant be dismissed hence with his costs in this behalf expended.

H. J. TILDEN,
Att'y for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

William Irvine, being duly sworn, deposes and says that he is the defendant named in the above-entitled cause; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

which are therein stated upon his information or belief, and
997 as to those matters he believes it to be true.

WM. IRVINE.

Subscribed and sworn to before me, this 12th day of November, 1874.

[SEAL.] D. K. SWIM,
Notary Public.

(Endorsed:) No. 8892. In 15th dist. court. Geo. P. Ihrie pl'ff, *vs.* Wm. Irvine, def't. Answer. H. J. Tilden, deft's att'y.

998 *Complainant's Exhibit No.* 21, (*p.* 271.)

Expenses paid.

To T. K. Wilson	$100 00
2 trips to San Andreas, $25	50 00
7½ months services, keeper mine	750 00
Taxes and redemption	107 70
Acknowledging deed	1 00
Expenses to San Andreas and C. W. I.	82 30
Fee to pay Jas. Hardy	50 00
Taxes paid for 1869 and 1870, by W. Irvine on $150.00	7 50
	$1,148 50

(Endorsed:) 1614. Dunham *v.* Irvine. Complainant's Exhibit No. 21. Filed 15 Feb'ry, 1878. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y.

999 *Complainant's Exhibit No.* 22, (*p.* 318.)

In District Court, 3d Judicial District, State of California, City and County of San Francisco.

H. J. TILDEN and T. K. WILSON, Plaintiffs,
vs.
RICHARD H. SINTON and WILLIAM IRVINE, Defendants.

The complaint of the plaintiffs respectfully represents unto the court:

That the plaintiffs now are, and for more than *for* years last past, have been attorneys and counselors-at-law, duly and legally entitled to practice as such in all of the courts in this State, and during all of that time have been, and still are, copartners, and doing business as such at the city and county of San Francisco, under the firm name and style of Tilden and Wilson.

That the defendants, Richard H. Sinton and William Irvine, are indebted to the above-named plaintiffs in the sum of ten thousand dollars in gold coin of the United States upon the balance of an account for the services of the plaintiffs as the attorneys of the de-

fendants rendered upon their retainer between the 29th day
1000 of October, 1873, and the 1st day of September, 1874, in defending certain suits; and for like services, at their request, in drawing, copying and engrossing various instruments in writing and in counseling and advising them, the defendants, and for divers journeys and other attendances in and about the business of said defendants at their request in and about said suit and business, which sum became due and payable from the defendants to the plaintiffs on the 1st day of September, A. D. 1874.

That on the 12th day of September, A. D. 1874, at the city and county of San Francisco, payment of the same was duly demanded of and from the said defendants, but no part thereof hath been paid.

Wherefore plaintiffs demand judgment in their favor and against said defendants for the sum of ten thousand dollars in gold coin of the United States, with legal interest thereon from September 1st, 1874, and costs of this suit.

TILDEN & WILSON,
Pl'ffs Att'y.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

1001 T. K. Wilson being duly sworn, deposes and says that he is one [of] the attorneys in the above-entitled cause; that he has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

T. K. WILSON.

Subscribed and sworn to before me, this 14th day of September, 1874.

COLIN M. BOYD.

(Endorsed:) No. 1004. In 3d dist. court. H. J. Tilden *et al.*, pl'ffs, *vs.* Richard H. Sinton, *et als.*, def'ts. Complaint assumpsit. Calaveras Co. Endorsed. Filed Sept. 14, 1874. Wm. Harvey, cl'k. By Colin M. Boyd, deputy clerk. Tilden & Wilson, att'ys, in pp. P'd $9.50. 2 aff't.

1002 In the District Court of the Third Judicial District of the State of California, in and for the city and county of San Francisco.

H. J. TILLEN and T. K. WILSON, Plaintiffs,
vs.
RICHARD H. SINTON and WILLIAM IRVINE, Defendants.
} Affidavit for Attachment against Presidents.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

T. K. Wilson, being duly sworn, says that he is one of the plain-

tiffs in the above-entitled action; that the deponents in the said action are indebted to plaintiff in the sum of ten thousand dollars in gold coin of the United States, over and above all legal set-offs and counter claims upon an express contract for the direct payment of money, to wit, upon a balance of an account for legal services rendered by the above-named plaintiffs as copartners, under the name, and style of Tilden and Wilson, which said services were so rendered by plaintiffs at the especial instance and request of defendants, and that such contract was made and is payable in this State, and that the payment of the same has not been
1003 secured by any mortgage, lien, or pledge, upon real or personal property, or any pledge of personal property.

And this deponent further says that the sum of which the attachment is asked in this cause, that is to say, the amount of indebtedness, which is above stated, is an actual *bona fide*, existing debt, due and owing from the said defendant to the said plaintiff; and that the said attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant.

T. K. WILSON.

Subscribed and sworn to before me, this fourteenth day of September, A. D. 1874.

COLIN M. BOYD,
Dep'y Co. Clerk.

(Endorsed:) No. 1004. In the third district court, city and county of San Francisco. H. J. Tilden *et als. vs.* Richard H. Sinton, *et als.* Affidavit for attachment. Filed Sept. 14, 1874, at —— o'clock m. Wm. Harney, clerk, by Colin M. Boyd, deputy clerk. Tilden and Wilson, attorneys for plaintiffs.

1004 OFFICE OF THE SHERIFF OF THE COUNTY OF CALAVERAS, *ss:*

I hereby certify that by virtue of the annexed writ of attachment received September 16th, A. D. 1874, at 10 o'clock a. m., I have this 16th day of September, A. D. 1874, at 5 o'clock p. m., attached the following described property in the State of California and county of Calaveras, to wit: All the right, title, and interest of the said defendants, Robert H. Sinton and William Irvine, of, in, and to that certain quartz mining claim, known as and called the Morgan Gold and Silver Quartz Mine, designated by the surveyor general as lot No. 46, embracing a portion of section thirteen (13) and fourteen (14), in township two (2) north, of range thirteen (13) east, Mount Diablo meridian, in the Carson mining district, in the county of Calaveras and State of California, in the district of lands subject to sale at Stockton, embracing four (4) acres and twenty-eight hundredths $\frac{28}{100}$ of an acre of land, more or less, and according to the returns on file in the general land office, bounded, described, and plotted as follows, with magnetic variations at section (16) de-

grees thirty (30) minutes east, to wit: Beginning at post in stone, mounted on line of Morgan and Union mines;
1005 thence north thirty-two (32) degrees east, three (3) chains, to section line between sections thirteen (13) and fourteen (14), in township two (2), north, of range thirteen (13) east, Mount Diablo meridian, four (4) chains and ninety-three (93) links to post in stone mound, from which the quarter section corner, between said sections thirteen (13) and fourteen (14), bears north two (2) degrees west, at the distance of twenty-two (22) chains and ninety (90) links. Thence from said post south forty-two (42) degrees east, six (6) chains and fifteen (15) links to post in stone mound on western boundary of survey 39, patented to Grbriel K. Stevenot and others, with their claim on the reserve mine; thence south thirty-three (33) degrees west, one (1) chain and fifty-five (55) links, to live-oak tree, fourteen (14) inches in diameter; thence south twenty-five (25) degrees west, one (1) chain and fourteen (14) links, to post situated at the southwest corner of said survey No. 39, and at the northwest corner of survey No. 41, patented to Gabriel K. Stevenot and William Jeffrey, with their claim on the Melones or Point Rock mine; hence south thirty-five (35) degrees thirty minutes (30) minutes west, four (4) chains and fifty-four (54) links, to post
1006 at the southwesterly corner of said survey No. 4; thence north forty-two (42) degrees west, one (1) chain and fifty (50) links, to section line between said sections thirteen (13) and fourteen (14), six (6) chains, to post in stone mound; thence north thirty-two (32) degrees east, two (2) chains and thirty-four (34) links, to the place of beginning, containing four (4) acres and twenty-eight hundredth $\frac{28}{100}$ of an acre of land, more or less.

The interest of the defendant, Richard H. Sinton, of, in, and to the above-described property is standing on the records of the county of Calaveras, in the name of George P. Ihrie, and recorded in "Book X," on pages 28, 29, and 30. And I further certify that I executed said writ by filing a true copy thereof, together with a notice of attachment and description of the property, in the office of the county recorder in and for the county of Calaveras aforesaid.

Also, by posting a true copy thereof, together with a notice of attachment and description of the property, in a conspicuous place upon the premises, there being no occupant of the property within the county.

B. K. THORN,
Sheriff of Calaveras County.
By A. G. THORN,
Under Sheriff.

Dated this 17th day of September, 1874.
Sheriff's fees, $\$11\frac{25}{100}$.

1007 In the District Court of the Third Judicial District of the State of California in and for the city and county of San Francisco.

H. J. TILDEN AND T. K. WILSON, Plaintiffs,
vs.
RICHARD H. SINTON & WILLIAM IRVINE, Defendants,
} Writ of Attachment.

The people of the State of California, to the sheriff of the county of Calaveras, Greeting:

Whereas the above-entitled action was commenced in the district court of the third judicial district of the State of California, in and for the city and county of San Francisco, by the plaintiff in the said action, to recover from the defendants, Richard H. Sinton and William Irvine, in the said action, the sum of ($) ten thousand dollars in gold coin of the United States, besides interest at the rate of seven per cent. per annum from the first day of September, A. D. 1874, and cost of suit, and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff, that
1008 you attach and safely keep all the property of said defendants, or either of them, within your said county, (not exempt from execution,) or so much thereof as may be sufficient to satisfy the said plaintiffs' demand, as above mentioned, unless the said defendants give you security, by the undertaking of at least two sufficient sureties, in amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Hon. Sam'l B. McKee, judge of the said district court of the third judicial district, this fourteenth day of September, A. D. 1874.

Attest my hand and the seal of said court, the day and year last above written.

WILLIAM HARNEY, *Clerk.*
By COLIN M. BOYD, *Deputy Clerk.*

(Endorsed:) No. 1004. Third district court. H. J. Tilden
1009 et als., plaintiffs, *vs.* Richard H. Sinton et als., defendants. Writ of attachment. Filed Sept. 23d, 1874. William Harney, clerk. By Colin B. Boyd, deputy clerk. Tilden & Wilson, plaintiffs' attorney.

I, Thomas H. Reynolds, county clerk of the city and county of San Francisco, State of California, and ex officio clerk of the third district court in and for the city and county of San Francisco, hereby certify the foregoing to be full, true, and correct copies of the original complaint, affidavit for attachment, and writ of attachment, with sheriff's return thereon, now on file in my office.

Attest my hand and seal of said court, this 30th day of December, A. D. 1876.

[SEAL.] THOS. H. REYNOLDS, *Clerk.*
By COLIN M. BOYD.

(Endorsed:) Tilden & Wilson *vs.* Sinton and Irvine. In
1010 3d dist. court of Cal. Certified copies of complaint. Aff. for attachment and writ of attachment and sheriff's return thereon. Filed 15th Feb'y, 1874. L. S. B. Sawyer, cl'k. By J. F. O'Beirne, d'p'y cl'k.

1011 *Complainants' Exhibit No.* 24, (*p.* 324.)

In the District Court of the Third Judicial District of the State of California in and for the City and County of San Francisco.

Action brought in the District Court of the Third Judicial District of the State of California in and for the City and County of San Francisco, and the complaint in said City and County of San Francisco in the office of the Clerk of the said District Court.

H. J. TILDEN and T. K. WILSON, Plaintiffs,
vs.
RICHARD H. SINTON and WILLIAM IRVINE, Defendants.

The people of the State of California send greeting to Richard H. Sinton and William Irvine, Defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiffs in the district court of the third judicial district of the State of California in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise,
1012 within forty days, or judgment by default will be taken against you, according to the prayer of said complaint. The said action is brought to recover of you the sum of ten thousand dollars in gold coin of the United States, and legal interest thereon from September 1st, A. D. 1874, alleged to be due from you to the plaintiffs upon a balance of an account for legal services rendered and moneys paid, laid out, and expended by them for you at your special instance and request, and for costs of suit, all of which will fully appear from plaintiffs' complaint on file herein, to which reference is hereby expressly made.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiffs will cause your default to be entered, and take judgment against you for $1,000.00 and costs and interest as aforesaid in U. S. G. coin.

Given under my hand and seal of the district court of
[SEAL.] the 3d judicial district of the State of California in and for the city and county of San Francisco, this 14th day of Sep-

tember, in the year of our Lord one thousand eight hundred and seventy-four.

WILLIAM HARNEY, *Clerk.*
By COLIN M. BOYD, *Deputy Clerk.*

1013 The defendants in this action are hereby given ten days from this date to plead to the complaint.

TILDEN AND WILSON,
Attorneys for Plaintiffs.

SAN FRANCISCO, *October 5th*, 1874.

Endorsed: No. 1004. Compl'ts' Ex. 24. Third district court. Rec'd 25th Sep't, 1874. H. J. Tilden *et al. vs.* Richard H. Sinton *et al.* Copy. Summons. Tilden & Wilson, plaintiffs' attorneys. —— in pp. ——. Filed ——187—. William Harney, clerk. By ——, deputy clerk. Filed Feb. 15, '78. L. S. B. Sawyer, Cl'k. By J. F. O'Beirne, D'p'y.

1013½ *Defendants' Exhibit A.*

[U. S. Int. Rev. 2c. Stamp.] Received of Williom Irvine the sum of one hundred and twenty-three $\frac{50}{100}$ dollars, in gold coin of the United States, in full payment for money advanced on account of the purchase of the Morgan mine, Calaveras Co., Cal.

(Signed) T. K. WILSON.

July 9th, 1870, San Francisco.

[U. S. Inter Rev. 2c. Stamp.] Received of William Irvine the sum of twenty dollars in gold coin on account of services rendered in the matter of the Morgan mine, Calaveras Co., Cal.

(Signed) T. K. WILSON.

San Francisco, July 9, 1870.

Endorsed: Filed Feb'y 15, 1878. L. S. B. Sawyer, clerk. By J. F. O'Beirne, Dep'y Cl'k.

1014 In the circuit court of the United States for the ninth circuit and district of California.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE, *et al.* } No. 1614. In equity.

Notice of decree and appointment by master of time, &c., for taking, &c., account.

The defendants and their attorneys will please take notice that the court has rendered its decree herein, and appointed L. S. B. Sawyer, Esq., master, to take and report an account pursuant to said decree, and that said master has appointed Thursday, May 9th,

1878, at 10 o'clock a. m., for taking said account and hearing the evidence of the parties herein, at his office, in the north-east corner of Battery & Washington streets, in this city. On that day we will on the part of the plaintiff attend and present our evidence, and you are required to attend and state your account, and produce your evidence thereon.

SAN FRANCISCO, *May 6th*, 1878.

WILSON & WILSON,
Solicitors for Complainant.

To Messrs. Garber & Thornton, & C. T. Botts, solicitors for defendant.

1015 Endorsed: No. 1614. U. S. circuit court, ninth circuit, district of California. Sumner T. Dunham vs. William Irvine et al.

Notice of decree and appointment by master of time and place for taking and stating account.

Service hereof rec'd May 6th, 1878.

C. T. BOTTS AND
GARBER & THORNTON,
Per CARL,
Att'ys for Defendants.

Filed 7th May, 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *D'p'y Clk.*

1016 *Notice of master to attorneys, &c., for purpose of stating, &c., account, &c.*

In the circuit court of the United States for the ninth circuit, and district of California.

SUMNER T. DUNHAM
vs.
WILLIAM IRVINE *et al.* } No. 1614. In equity.

The parties and their attorneys will please take notice, that on Thursday, the ninth inst. at 10 o'clock a. m., at my office, in the building of the U. S. circuit court, on north-east corner of Battery and Washington street, I will, as the master appointed by the decree of the above-entitled court in the above-entitled cause, proceed to take the account between the parties pursuant to said decree. You will please then and there appear with your evidence and documents.

SAN FRANCISCO, *May 6*, 1878.

L. S. B. SAWYER,
Master in Chancery.

To Messrs. Garber & Thornton, & C. T. Botts, att'ys for defendant's, and Messrs. Wilson & Wilson, attorneys for plaintiff.

1017 Endorsed: 1614. U. S. circuit court, 9th circuit, district of California. Sumner T. Dunham *vs.* Wm. Irvine, *et al.* Notice by master to att'ys to appear for purpose of stating and taking account pursuant to decree.

Copy of within rec'd May 6th, 1878.

C. T. BOTTS AND
GARBER & THORNTON,
Per CARL,
Att'ys for Defendants.
WILSON & WILSON,
Att'ys for Complainant.

Filed May 7th, 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *D'p'y Cl'k.*

Notice by Master to Solicitors to appear for purpose of stating, &c., account, &c.

1018 In the Circuit Court of the United States, ninth circuit and district of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et als.*, Defendants,
} No. 1614. In Equity.

The parties and their attorneys will please take notice that on Wednesday, the seventeenth day of July, A. D. 1878, at 10 o'clock a. m., at my office, in the building of the U. S. circuit court on the northeast corner of Battery and Washington streets, in this city, I will, as the master appointed by the decree of the above-entitled court in the above-entitled cause, proceed to take the account between the parties pursuant to said decree. You will please then and there appear with your evidence and documents.

L. S. B. SAWYER,
Master in Chancery.

SAN FRANCISCO, *July 12th*, 1878.

To Messrs. Garber & Thornton & C. T. Botts, solicitors for defendants, and Messrs. Wilson & Wilson, solicitors for complainants.

1019 (Endorsed:) No. 1614. U. S. circuit court, 9th circuit, district of California. Sumner T. Dunham, complainant, *vs.* William Irvine *et. al.*, defendants. Notice by master to solicitors to appear for purpose of sating and taking account, &c. Rec'd copy July 12, 1878. Garber, for defendant, Wilson & Wilson for complainant. Filed July 12th, 1878. L. S. B. Sawyer, clerk. By. J. F. O'Beirne, dep'y cl'k.

Notice of taking, &c., account, and to appear before Master, &c.

1021 In the Circuit Court of the United States for the ninth circuit and district of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE *et al.*, Defendants. } No. 1614. In Equity.

To Messrs. GARBER & THORNTON AND C. F. BOTTS,
Solicitors for Defendants.

GENTLEMEN: The defendants, and you, their solicitors, will please take notice that L. S. B. Sawyer, Esq., the master appointed to take and report an account pursuant to the decree of said court heretofore rendered and entered in the above-entitled cause has appointed Wednesday, the seventeenth (17) day of July, A. D. 1878, at 10 o'clock a. m., for taking said account and hearing the evidence of the parties therein, at his office, on the northeast corner of Lansome and Washington streets, in this city.

On that day we will, on the part of the plaintiff, attend
1021 and present our evidence, and you are required to attend and state your account and produce your evidence thereon.

SAN FRANCISCO, *July 12th*, 1878.

WILSON & WILSON,
Solicitors for Complainants.

(Endorsed:) No. 1614. U. S. circuit court, 9th circuit, district of California. Sumner T. Dunham, complainant, *vs.* William Irvine *et al.*, defendants. Notice of taking and stating account, and to appear before master. Rec'd copy, July 12, '78. Garber, for def't. Wilson & Wilson, solicitors for complainant. Filed July 12th, 1878. L. S. B. Sawyer, clerk. By J. F. O'Beirne, d'p'y cl'k.

1022 *Notice of Motion for Final Decree.*

In the Circuit Court of the United States for the ninth circuit and district of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE AND THE MORGAN MINING COMPANY, Defendants. } No. 1614. In Equity.

The defendants and their attorneys will please take notice that on Monday, the twenty-seventh day of October, 1879, on the opening of court on said day, or as soon thereafter as counsel can be heard, we will move the above-entitled court at the court room thereof in the city and county of San Francisco, to enter a final decree in this suit in the form, a copy of which is herewith served on you, and

that all questions heretofore reserved be settled and determined—the motion will be made on the files, records, and entries in said suit.

WILSON & WILSON,
Solicitors for Complainants.

OCTOBER.

To Hon. C. T. BOTTS, *Solicitor for Defendants.*

1023 In the Circuit Court of the United States for the ninth circuit and district of California.

SUMNER T. DUNHAM, Complainant,
vs.
WILLIAM IRVINE AND THE MORGAN MINING COMPANY, Defendants.
} No. 1614.

This cause having heretofore come on for hearing at the July term thereof, in the year 1877, and having been argued by counsel and taken under advisement by the court, and the court, at the February term, 1878, having duly considered the same, and having at said last named term ordered and decreed as follows, that is to say:

That the defendant William Irvine was, at the time of the filing of the bill of complaint herein, and still is, the trustee of and for the complainant, and held and still holds as such trustee for the use and benefit of the complainant the one-half of nine thousand nine hundred and ninety-seven (9,997) shares of the capital stock of the Morgan Mining Company referred to in the
1024 complaint, the said shares being the gross proceeds received by said defendant Irvine, for and as the consideration of a conveyance and disposition by him to said mining company of the one-half of the mining property called the "Morgan Mine," referred to in the said declaration of trust dated March 28th, A. D. 1874, mentioned and described in the bill of complaint herein, said one-half of said capital stock so held by said defendant Irvine in trust for the complainant, being, however, subject to a claim of the said defendant Irvine against the same for one-half of all necessary expenses referred to in said declaration of trust, and it is ordered that it be referred to L. S. B. Sawyer, Esq., as a master to take and state an account of all the necessary expenses, including counsel fees, before the twenty-eighth day of March, A. D. eighteen hundred and seventy-four, incurred, or thereafter incurred, in and about said property by said defendant Irvine, up to the time of the conveyance of said property by said Irvine to said Morgan Mining Company; and in taking said account the said master shall make unto said complainant all just allowances, as well for all
1025 moneys paid by him as by his assignors or grantors, George P. Ihrie and Richard H. Sinton, or other persons, by their or either of their request, or by their or either of their procurement to said Irvine, or at his request, or for the benefit of said mining property referred to in said bill of complaint; and the master shall make

all just allowances to said defendant Irvine, and the master shall state what upon the balance of said accounts shall be due from the complainant to said defendant Irvine. And in taking and stating the account before said master either of the parties are at liberty to use any of the evidence heretofore taken in this case, and to introduce other evidence. And the master is to make his report touching the matters hereby referred to him with all convenient speed.

And the said master having in all things complied with the order so as aforesaid made, and (after hearing the parties,) having made his report and stated an account between the parties, and the same having on exceptions duly filed, been in some things modified by the court, and as so modified confirmed. And it appearing
1026 from the premises that there is due from the plaintiff to the defendant William Irvine on such accounting the sum of four hundred and forty-two $\frac{33}{100}$ dollars (442.33.)

And this cause again came on for hearing on said report of the master so confirmed, and on motion for final decree at the July term of this court, and was argued by counsel and taken under advisement by the court; and the same having been duly considered, thereupon on such consideration, it is ordered, adjudged, and decreed, that the defendant William Irvine was at the time of the filing of the bill of complaint herein, and still is the trustee of and for the complainant, and held, and still holds as such trustee for the complainant the one-half of nine thousand nine hundred and ninety-seven (9,997) shares of the capital stock of the said Morgan Mining Company referred to in the complaint, being the gross proceeds received by said defendant Irvine, for and as the consideration of a conveyance and disposition by him to said mining company of the one-half of the mining property called the "Morgan Mine," referred to in the declaration of trust dated March, twenty-eight,
1027 1874, (mentioned and described in the bill of complaint herein,) said one-half of said capital stock so held by said defendant in trust for the complainant, being, however, subject to the claim of said defendant Irvine against the same for one-half of the necessary expenses referred to in said declaration of trust, which amounts to the sum of four hundred and forty-two $\frac{33}{100}$ dollars ($442.33.)

And it is further ordered, adjudged, and decreed, that upon the payment of said last sum of money by said complainant to said defendant Irvine, the said Irvine do assign and transfer to said complainant four thousand nine hundred and ninety-eight and one-half (4,998½) shares of the capital stock of said Morgan Mining Company and that said company do cause the same to be transferred upon the books of said corporation, from the name of said defendant William Irvine to said complainant, and that in default of said defendant Irvine or said company, L. S. B. Sawyer, the clerk of this court be, and he is hereby appointed a commissioner with power and authority to represent said defendant Irvine, and to transfer and as-
1028 sign in his name the said four thousand nine hundred and

ninety-eight and one-half (4,998½) shares of said capital stock of said Morgan Mining Company, from said defendant Irvine, and out of his name to the complainant, and to the name of said complainant.

And it is further ordered and decreed, that the defendant Irvine be perpetually enjoined and restrained from transferring or assigning in any manner the said four thousand nine hundred and ninety-eight and one-half (4,998½) shares of said capital stock to any one other than the complainant or his legal representatives or assigns, and that the complainant have and recover of said defendant Irvine his costs in this behalf expended.

Endorsed: No. 1614. U. S. circuit court, State of California, city and county of San Francisco. Sumner T. Dunham, complainant, *vs.* William Irvine and The Morgan Mining Co., defendants.

1029 Notice of motion for final decree. Services of a copy of the within is hereby admitted this twenty-first day of October, 1879. John Garber, solicitor for def'ts. Ch. T. Botts, of counsel. Filed October 27, 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, d'p'y cl'k.

1030 *Order Granting Appeal.*

At a stated term, to wit, the November term, A. D. 1879, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court room, in the city and county of San Francisco, on Friday, the 2d day of January, in the year of our Lord one thousand eight hundred and eighty.

Present: The Honorable Lorenzo Sawyer, circuit judge.

SUMNER T. DUNHAM *vs.* WILLIAM IRVINE *et al.*

And now at this day comes the defendant, William Irvine, by his solicitors, Garber and Thornton, and moves the court that an

1031 appeal be granted to the Supreme Court of the United States from the decree of this court in the above-entitled cause, filed and entered of record on the twenty-fourth day of December, A. D. 1879.

Whereupon it is ordered that such appeal be, and hereby is, granted, and it is further ordered that a supersedeas bond to answer all costs and damages shall be given in the penal sum of fifteen thousand dollars.

1032 *Bond.*

In the Supreme Court of the United States of America.

WILLIAM IRVINE, Appellant, *vs.* SUMNER T. DUNHAM, Appellee.

Know all men by these presents that we, William Irvine, as principal, and John Timmons and H. W. Smith and Oliver McAvoy, as sureties, are held and firmly bound unto Sumner T. Dunham, the

above-named appellee, in the sum of fifteen thousand dollars, gold coin of the United States of America, to be paid to the said Sumner T. Dunham, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us,
1033 jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

In witness whereof we have hereunto set our hands and affixed our seals this second day of January, A. D. 1880.

The condition of the above obligation is such that whereas the above-named William Irvine has taken an appeal to the Supreme Court of the United States of America to reverse the decree rendered by the circuit court of the United States of the ninth judicial circuit in and for the district of California, in the suit of "Sumner T. Dunham *versus* William Irvine and The Morgan Mining Company," which said decree was filed and entered of record in said circuit court on the twenty-fourth of December, A. D. 1879.

1034 Now, therefore, if the above-named William Irvine shall prosecute his said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and effect.

WM. IRVINE. [SEAL.]
JOHN TIMMONS. [SEAL.]
H. W. SMITH. [SEAL.]
OLIVER McAVOY. [SEAL.]

Signed, sealed, and delivered in presence of—

J. H. BLOOD.

STATE OF CALIFORNIA, *City and County of San Francisco:*

John Timmons and H. W. Smith, and Oliver McAvoy, being duly sworn each for himself, says that he is a resident freeholder within the State aforesaid, and that he is worth the sum of ten thousand dollars, exclusive of property exempt from execu-
1035 tion, and over and above all his just debts and liabilities.

JOHN TIMMONS.
H. W. SMITH.
OLIVER McAVOY.

Subscribed and sworn to before me this 2d day of January, A. D. 1880.

[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer. Dated Jan'y 2d, 1880. Filed January 2d, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

1036 UNITED STATES OF AMERICA, } ss:
District of California, }

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing one thousand and thirty-five written pages, numbered from 1 to 1035 inclusive, are a full, true, and correct copy of the record and of all proceedings, except Exhibit number 15, referred to in the deposition of R. H. Sinton, and Exhibit number 23, referred to in the deposition of T. K. Wilson in the therein entitled cause, and that the same constitutes the transcript on appeal to the Supreme Court of the United States therein.

Witness my hand and the seal of said circuit court this 26th day of October, A. D. 1880.

L. S. B. SAWYER, *Clerk.*

1037 UNITED STATES OF AMERICA, ss:

To Sumner T. Dunham, Greeting:

Qou are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at the the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1880, pursuant to an order made by the circuit court of the United States of America for the district of California, and entered of record on the 2d day of January, A. D. 1880, granting an appeal to said supreme court from the decree of said circuit court in the cause entitled Sumner T. Dunham *versus*
1038 William Irvine and The Morgan Mining Company, filed and entered of record on the twenty-fourth day of December, A. D. 1879, to show cause, if any there be, why said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the *Supreme Court of the* United States of America this 13th day of January, A. D. 1880, and of the independence of the United States the 104th.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

Endorsed on cover: California C. C., U. S. No. 243. William Irvine, appellant, *vs.* Sumner T. Dunham. Filed 30th April, 1881.

[illegible]

Supreme Court of [illegible]

October Term, [illegible]

WILLIAM IRVINE, Appellant,

vs.

SUMMER T. DUNHAM, Appellee.

No. [illegible]

GEO. W. [illegible]

Atty. [illegible]

R. O. POLKINHORN, [illegible]

IN THE

Supreme Court of the United States.

October Term, 1883.

WILLIAM IRVINE, *Appellant*

vs.

SUMMER T. DUNHAM, *Appellee.*

No. 243.

Statement.

This cause, one of claimed equity jurisdiction, was decided in the Circuit Court of the United States, for the Ninth Circuit, District of California, Hon. Lorenzo Sawyer, Judge, in favor of the plaintiff, Dunham.

The complaint alleges Irvine to be the holder of one-half of the capital stock of the Morgan Mining Company, a corporation, said one-half being 10,000 shares; and that he holds one-half of said 10,000 shares in trust for the plaintiff, Dunham, subject however, to the payment to said Irvine from the proceeds of said 10,000 shares of *all* of the expenses incurred by Irvine in connection with the whole 10,000 shares; and the object of this suit is to establish by the decree of the court, that said Irvine is the trustee of said Dunham for said one-half of said shares held by him, and to procure an accounting as to the amount of the expense incurred by Irvine in connection with said 10,000 shares; and a decree that upon payment by Dunham to Irvine of *one-half* of such expenses, Irvine transfer and deliver to Dunham one-half part of said 10,000 shares of stock.

IN THE

Supreme Court of the United States.

October Term, 1883.

WILLIAM IRVINE, *Appellant*
vs.
SUMMER T. DUNHAM, *Appellee.*
No. 243.

Statement.

This cause, one of claimed equity jurisdiction, was decided in the Circuit Court of the United States, for the Ninth Circuit, District of California, Hon. Lorenzo Sawyer, Judge, in favor of the plaintiff, Dunham.

The complaint alleges Irvine to be the holder of one-half of the capital stock of the Morgan Mining Company, a corporation, said one-half being 10,000 shares; and that he holds one-half of said 10,000 shares in trust for the plaintiff, Dunham, subject however, to the payment to said Irvine from the proceeds of said 10,000 shares of *all* of the expenses incurred by Irvine in connection with the whole 10,000 shares; and the object of this suit is to establish by the decree of the court, that said Irvine is the trustee of said Dunham for said one-half of said shares held by him, and to procure an accounting as to the amount of the expense incurred by Irvine in connection with said 10,000 shares; and a decree that upon payment by Dunham to Irvine of *one-half* of such expenses, Irvine transfer and deliver to Dunham one-half part of said 10,000 shares of stock.

The decree of the Circuit Court established the trust and directed that Irvine transfer to Dunham one-half of the stock of the Morgan Mining Company held by him, upon the payment to him, by said Dunham, of the sum of $14,221.76, that sum being *one-half* of the expenses found by the Circuit Court to have been incurred by Irvine in connection with said stock of the said Morgan Mining Company so held.

The cause comes into this court upon an appeal, taken by Irvine, from the final decree entered in the said Circuit Court.

The facts showing Irvine to be a trustee for Dunham of said stock as alleged in the complaint are, in substance, that on the 28th day of March, 1874, Irvine was the owner of an undivided one-half part of the Morgan mine, and that he then agreed to hold the same in trust for himself and one R. H. Sinton, share and share alike; and that thereafter, on said 28th day of March, 1874, said Irvine and said Sinton entered into an agreement with reference to said one-half of said mine and the proceeds thereof, which agreement is made a part of the complaint—Exhibit A thereof—by which said agreement said Irvine promised to account to said Sinton for the one-half of all *net proceeds* of a sale or other disposition of said half interest; *all* necessary expenses, including counsel fees, incurred in and about the property, up to the time of such sale or other disposition thereof, to be first paid before division of such proceeds; and it is then further alleged that, by a conveyance from said Sinton to Geo. P. Ihrie, and from said Ihrie to plaintiff, the said interest of said Sinton in and to said mine and the proceeds thereof has vested in plaintiff; the said 10,000 shares of said stock being alleged to be the proceeds of the disposal of said one-half part of said Morgan mine.

The answer denies all the material allegations of the bill; denies that Sinton ever contributed either labor or money to the acquisition of the property, and alleges that it was

acquired by Irvine on his own account, and denies that Sinton ever had any interest therein, legal or equitable.

Irvine admits that he signed the document, Exhibit A, called a declaration of trust, but alleges that it was never delivered to Sinton; that it was signed without consideration and deposited with Mr. T. K. Wilson, his, Irvine's, attorney to be held by him, and to be by him delivered to Sinton only in the event that he, Irvine, should die on a trip which he, Irvine, was then about to make to the city of New York.

The questions presented are--

1st. Does the complaint state a cause of action?

2d. Did Irvine hold the undivided one-half part of the "Morgan mine" in trust for himself and said Sinton as alleged?

3d. What is the force and meaning of said Exhibit A, complainant's Exhibit No. 2?

4th. What, if any, interest in said mine or its proceeds has been conveyed from said Sinton through said Ihrie to plaintiff?

5th. Does the proof show the happening of the contingency upon which alone, as alleged in the complaint, the right of plaintiff to an *accounting* with Irvine, rests, to wit, a sale or other disposition of said mining property by Irvine for a sum sufficient to pay *all* necessary expenses, including counsel fees incurred by said Irvine in and about the said property up to the time of such sale or other disposition, and leave a *net* proceed in his hands?

SPECIFICATION OF ERRORS.

Appellant alleges that the final decree entered in this cause, in said Circuit Court, is erroneous, in this, that:

I.

The said Circuit Court was without jurisdiction to enter a decree herein.

II.

It adjudged that William Irvine was, at the time of the filing of the bill of complaint herein, and still is, the trustee of and for the complainant, and held and still holds as such trustee for complainant, the one-half of 9,997 shares of the capital stock of the said Morgan Mining Company referred to in the complaint.

III.

It adjudged said 9,997 shares of the capital stock of the said Morgan Mining Company referred to in the complaint to be the gross proceeds of a *disposition* by said Irvine of said mining property called the "Morgan mine," referred to in the declaration of trust, dated March 28, 1874, mentioned and described in the bill of complaint herein.

IV.

It adjudged that said Irvine had disposed of said mining property called the "Morgan mine," within the intent and meaning of said declaration of trust of date the 28th day of March, 1874, and mentioned and described in the complaint herein.

V.

It adjudged that one-half of said capital stock so held by said defendant, to-wit: one-half of said 9,997 shares, should be by said defendant transferred to complainant upon the payment to said defendant by complainant of *one-half* the expenses incurred by said defendant in connection with the said 9,997 shares of stock so held, and referred to in said declaration of trust of date the said 28th day of March 1874.

VI.

It adjudged that said Irvine upon the receipt of the sum of $14,221.76, said sum being adjudged to be one-half of said expenses so incurred by said Irvine, together with certain interest upon said sum within sixty days from the date of said decree do assign and transfer to said complainant his legal representatives or assigns 4,998½ shares of the said capital stock of the said Morgan Mining Company.

VII.

It ordered that said Irvine during the period of sixty days next, after the entry of said decree, be enjoined from incumbering or transferring or assigning in any manner the said 4,998½ shares of said capital stock to any other than the complainant, his assignees or legal representatives.

BRIEF.

In order that the relations of the parties to this action to the property that is the subject matter of this suit may be clearly understood, we preface our argument with a statement of so much of the testimony as we think materiai for such purpose.

The complainant's case must rest very largely, if not entirely, upon the testimony of his witness R. H. Sinton.

The connected statement of said Sinton's testimony, here presented, whatever other it may show, demonstrates clearly that he was willing to lend himself to the furtherance of a scheme to sequester the property of the estate of A. Gray Morgan, his deceased friend, of which estate he procurred himself to be appointed administrator, apparently for that purpose only; and it also shows that said Sinton was equally ready, if not to originate, (see answer to Q. 148, p. 120,) at least to counsel and advise in, and so far as he could, execute a scheme which was intended, by him, to defraud the

co-tenants of said Morgan of their interests in the Morgan mine; such co-tenants also being the friends of said Sinton.

His statement, gathered from his testimony upon direct and cross-examination, is substantially as follows:

In 1851, what is known as the Morgan mine, situate in Calaveras county, California, was owned by one A. Gray Morgan and six or more other persons (p. 101, pp. 114–15). R. H. Sinton was then at the mine, a guest of the owners of it (p. 114–15).

Sinton drew certain papers, which conveyed to said A. Gray Morgan the interests of his cotenants (p. 120), the object of which conveyances was to enable Morgan to sell the mine in London (p. 180), Morgan at the time executing in return a declaration of the object of such conveyances to him, and of the character of his holding (p. 180).

Morgan died at Sacramento, in the year 1858 or 1859, not having effected a sale of the mine (p. 115).

Sinton, who was a creditor of Morgan (p. 117), qualified as administrator of his estate (p. 115), and procured from the Probate Court of San Francisco (p. 169) an order for the sale of Morgan's interest in the said mine (p. 115), and such interest was sold (p. 115), James G. Fair becoming the purchaser (pp. 115).

No money was paid by Fair on account of the purchase (p. 117), but, instead, it was arranged between Sinton and one A. A. Selover, a creditor of the estate of Morgan, and Fair, that the sum of $1,000, the nominal purchase price of the mine, should be credited by Selover upon his claim against the estate of Morgan, and that Fair should take all necessary proceedings in and about the mine, and Selover should be equally interested with Fair in the property, Fair to have a first claim against it for his expenses (p. 117).

Selover had obtained his claim against the estate of Morgan by assignment from Sinton; when, does not ap-

pear (p. 117), and Sinton, after such assignment, continued to be the creditor of such estate to the extent of thousands of dollars (p. 117), and had incurred expenses to the amount of $150; that he has never been paid (p. 117), as no other assets ever came to the hands of Sinton, administrator (p. 169).

The estate of Morgan is still unclosed, and Sinton's accounts, as administrator, unsettled (p. 118), and we find that Sinton claims that in 1866 he was equally interested with Selover in the Morgan mine, (p. 137.)

In 1867 Addison and others, representing the interests of the said cotenants of Morgan, instituted suit against Fair and Selover and Sinton (pp. 116–119), which suit never came to trial (p. 116), but instead work upon the mine was stopped (p. 154), and in 1869 Fair, then being in possession (p. 116), determined to procure a sale of the mine for taxes, (p. 119); that some confidential friend should be found who would buy the property at tax sale, and then convey it back to Fair and Selover, and they were willing to pay any one who would conduct that *delicate* negotiation (pp. 102, 121) the scheme being by such a proceeding to defraud said Addison and others, their cotenants, of their interests in the mine (pp. 119, 120, 143–44, 134–35).

Sinton says: "In looking about for a proper person to in trust with this *delicate* operation, I made the acquaintance of William Irvine. I introduced the subject-matter to him. * * * He consented to do it, and finally became the owner of the tax title;" * * * (p. 102;) and again:

Q. 197, To Mr. Sinton: Was there an agreement on his, Irvine's, part; did he agree to purchase that title and convey it to you?

A. No; he did not; not in words.

Q. 198. Did he do it at all; did he do it by his looks?

A. The implication of the whole thing was—

Q. 199. (Interrupting.) I don't want any implication; just answer the question?

A. Then there was nothing. (p. 124.)

Q. 206. When you say, "there was no agreement about it," what do you mean?

A. That there was no written or oral agreement that at any future time that particular thing should be transferred to anybody or to any person. (p. 125.)

Q. 262. When was it that you told Mr. Irvine that all that you had done in and about this matter was done on behalf of Mr. Fair?

A. My impression is that it was not until after the issuance of the sheriff's deed; but whether before or after I cannot state upon oath in the premises. * * *

Q. 264. Until that time Mr. Irvine had never been apprised that Mr. Fair had any connection with this matter?

A. Until the time that I informed him, he never had; no, sir. (p. 129.)

At the tax sale for 1869 T. K. Wilson became the purchaser of the Morgan mine (p. 218), and thereafter transferred the certificate of sale to Irvine (p. 219), who in due course received a sheriff's deed for the property (p. 102).

Fair, who was then in possession, denied the entry of Irvine, who procured a writ of assistance, and was placed in possession (p. 102). Fair then brought an action of ejectment against Irvine, which, being decided in favor of Irvine, Fair appealed therefrom to the Supreme Court of the State (p. 145). The Supreme Court sustained the judgment of the District Court.

In 1870 an effort was made by Fair and Selover to procure a transfer of the title to the mine from Irvine to them (p. 103), which effort then came to nothing (p. 103), but was resumed in December, 1871, at which time W. H. L. Barnes acted for Fair and S. M. Wilson for Selover (p. 103), Irvine's proposal then being to transfer the mine to

Fair and Selover for the sum of $20,000, $5,000 down, and balance in one year guaranteed (p. 103), which proposal the attorneys agreed to communicate to their principals (p. 103).

Sinton communicated Irvine's proposal to Selover (pp. 136–37, 139). In October, 1872, no reply from Fair and Selover having been received (pp. 103, 137), Irvine prepared the paper writing, (complainant's Exhibit No. 11, p. 287,) and showed it to Sinton (p. 139).

Up to this time Sinton had been acting solely in the interest of Fair and Selover (pp. 103, 120, 128, 129, 131, 133, 134, 143, 144, 176, 177). Sinton, then, when shown the notification to Fair and Selover, wanted to know where he was going to come out (p. 176).

Q. 17. To Mr. Sinton: Of whom did you demand?

A. Of Mr. Irvine, and at once, without hesitation; he said that you and myself are equally interested in the matter, *after paying the necessary outlays and expenses*, to an equal division of "whatever *I get out of it*, and we occupied that position, verbally expressed, between each other *from that time* until the declaration of trust of the 28th March March, 1874, *that relation being merely verbal up to that time* (p. 104).

Q. 370. To Mr. Sinton: You really *had no interest in the Morgan mine in 1871*, either legal or equitable, had you?

A. Except in *the mere matter of the promise of Mr. Selover that he would give me* upon the final settlement of the matters relating to the mine—he and I would be equally interested in it. I had his verbal promise for that. * * *

Q. 371. *There was no consideration for the promise?*

A. *No consideration for the promise; no, none whatever* (p. 138).

When Irvine showed to Sinton the notification to Fair and Selover, October 1, 1872, the following, as detailed by Sinton, transpired:

Q. 389. To Mr. Sinton: Did you have anything to do with the concocting of that notification?

A. Mr. Irvine wrote the notification himself and we discussed it (p. 139).

Q. 391. Let us hear what discussion took place between you and him?

A. I could not tell you the words, but the tenor of the conversation was, *the burden of my song was* that I wanted to know when I was to come out in this thing. Under the *previous arrangement* with Mr. Selover I was to receive one quarter of the property, and Mr. Irvine assured me, upon the honor of a gentleman, and all that sort of thing, "you shall have *one quarter* of everything that *comes out of the property* (p. 140).

Q. 392. Did you advise the sending of that notification?

A. No, I did not; I did not advise it, because he had determined on it.

Q. 394. What opinion did you express about it?

A. That it would bring an issue right direct upon *him* at once.

Q. 395. A desirable issue you thought, did you not?

A. Well, I don't know as I thought it a desirable issue, because the whole thing *would cast me adrift*, if I did not have an understanding with him, *utterly*. (p. 140.)

Sinton never paid to Irvine one dollar of his own money in connection with the Morgan mine. (p. 156.)

All the money Sinton paid to Irvine in connection with the mine was furnished to him by, and the payment of it was made for, Mr Fair. (pp. 156, 128.)

Mr. Sinton, in his answer to Q. 814, p. 176, says, referring to the conversation between himself and Irvine at the time he was shown the notification to Fair and Selover: "* * * I wanted to know where I stood then, and he gave me the assurance that I should stand in the same position with him as that in which I stood with Mr. Selover

under his verbal promise. * * "(p. 176.) That was a promise, without consideration, *to give*. (p. 138, Ans. to Q. 370.)

It is clear, then, that the promise of Irvine, as stated by Sinton to have been made to him October 1st, 1872, did not invest Sinton with any legal or equitable demand against Irvine; and they occupied that position until the 28th of March, 1874. (p. 104.)

March 5th, 1872. Addison and others, representing the interests of the original co-tenants of A. Gray Morgan, had obtained judgment against Irvine for possession, from which judgment Irvine appealed (p. 292); and, pending the appeal, a compromise was, April 14, 1873, effected (p. 292,) by which said Addison and others were admitted as owners of an undivided one half of the property. (pp. 292–93.)

Q. 512. To Mr. Sinton: With respect to the compromise that was made between Mr. Irvine on the one side, and Bacon, Addison and others on the other side, of the date of April 14th, 1873, did you do anything except advise and talk with Mr. Irvine?

A. No. (p. 151.)

March 28th, 1874. Irvine was about to depart from the State with the purpose of going to Europe, (p. 106); Sinton knowing Irvine's purpose, wrote the body of complainant's exhibit, 2. p. 278, and requested Irvine to sign it and deliver it to him (p. 106); that Irvine refused to do, (p. 106, p. 220,–'21); they then proceeded together to the office of T. K. Wilson, Irvine's attorney (p. 106), and there, Irvine, in the presence of Sinton, stated to Wilson that the paper was to be signed and left with Wilson to be delivered to Sinton in case Irvine died upon his passage—or, at least, in case he never returned; if he, Irvine, did return the paper was to be returned to him. (p. 220, 230, 231, 232, 247.) Sinton assented to the conditions upon

which the paper was signed and deposited with Wilson. (p. 220, pp. 247,–'48, p. 107, pp. 106,–7.)

September 8, 1874. Sinton, in writing (p. 111) stated that said Exhibit 2 was deposited with and accepted by T. K. Wilson in escrow, (p. 279.) Irvine returned to the State in the July following (p. 220), and two or three days after his return applied to Wilson for the paper, said Exhibit 2 (p. 220, p. 248), and thereupon Wilson went to his safe to get the paper for the purpose of delivering it to Irvine, (p. 220, p. 248.) but not being able to at once place his hand upon it, its delivery was for that reason alone, deferred to another time. (p. 220, p. 248.) Wilson then remarking that its non-delivery to Irvine would make no difference, as it was merely delivered to him, Wilson, in escrow, anyway. (p. 220.) *Sinton never demanded of Wilson that he should deliver the paper, said Exhibit 2, to him.* (p. 182.)

The paper, Exhibit 2, remained in the possession of T. K. Wilson until he produced it under a subpœna, in this case. (p. 101, p. 220, p. 106.)

Sinton denied to anyone who spoke to him upon the subject that he had any interest in the property. (p. 191,–'92, p. 270.)

After the compromise with said Addison and others of date, the 14th of April, 1873, Irvine applied for and obtained a United States patent for the Mining ground, which patent bears date *March 9, 1874* (p. 217), said patent having been procured by Irvine under the said compromise agreement of April 14, 1873, (pp. 271, 277, p. 252, p. 282, –83,) to which said agreement Sinton was not a party, (see agreement pp. 271,–77,) by which agreement Irvine was to hold said Mining ground one-half for himself and one-half for said Addison and others.

September 8, 1874. Sinton executed and delivered to

Geo. P. Ihrie the paper writing (complainant's exhibit No. 4, pp. 111, 278,) which writing conveyed to Ihrie in words as follows, to wit, the said Sinton—

> "Does hereby grant, remise, release, and quit claim unto the said party of the second part (Ihrie,) and to his heirs and assigns forever, all of his right, title and interest in and to that certain gold-bearing quartz lode or mine * * * * known as the "Morgan" mine. * * * *The interest hereby conveyed* being an undivided one-quarter of the whole *derived to the party of the first part* by virtue of a declaration of trust executed by William Irvine, also of said city and county of San Francisco, and which declaration of trust is dated the 28th day of March, A. D. 1874, and witnessed by H. J. Tilden and T. K. Wilson, and *deposited with and accepted by said T. K. Wilson in escrow* according to the terms thereof," (p. 279.)

March 12, 1875. Irvine and his co-tenants formed themselves into a corporation known as the Morgan Mining Company. (pp. 112, 281.)

April 9th, 1875. Irvine conveyed the title to the Morgan mine to said corporation (pp. 113–282), and shortly thereafter 9,787 shares of the capital stock of said corporation were issued to Irvine. (p. 184.)

June 29, 1875. Ihrie quit claimed to plaintiff all his right, title and interest in and to the property, or the proceeds of the property conveyed to him by Sinton. (p. 280.)

February 23, 1876. Plaintiff demanded from Irvine 5,000 shares of the capital stock of the Morgan Mining Company, claiming the same as the successor in interest of R. H. Sinton, and especially under the paper writing of March 28th, 1874, and then offered to pay to Irvine, upon an accounting, *one half* of all the expenses, including counsel fees incurred by Irvine in and about the property up to the time it was deeded to the Morgan Mining Company, and also offered to pay all assessments that Irvine had paid or

that were then due upon said 5,000 shares of said stock. (p. 113, p. 285.)

Irvine, upon receipt of said notice, declined to comply therewith. (p. 286.)

The foregoing statement of the case is taken *entirely* from the testimony on the part of plaintiff, excepting as to T. K. Wilson's connection with the tax sale and the deposit in escrow of the so-called declaration of trust, which is partly taken from the testimony of defendant and of T. K. Wilson, a witness for defendant.

The defendant's statement of the facts is, in substance, that he has known the Morgan mine since 1850, he at that time living near it, (p. 238;) that in 1869 as he, in company with Mr. Gatewood, were walking together they were met by Sinton, who was a friend of Gatewood, and Gatewood introduced them, (p. 239.) Irvine then spoke of having met Sinton in Calaveras county years before on business in connection with the Morgan mine, (p. 239,) whereupon Gatewood remarked that the mine was going to be sold for taxes, and he advised Irvine to buy it, (p. 239.) Irvine prior to this had made arrangements with a Mr. Thorne, who was sheriff of Calavaras county, to buy the Morgan mine if it should be sold for taxes for their joint account (p. 240). Thorn wrote Irvine that the property had been bought by T. K. Wilson, and when Irvine next saw Sinton he showed him that letter (p. 240).

In the July following Sinton wanted to know of Irvine if he had got a deed of the mine from the sheriff, and was told he had (p. 241), and Sinton then commenced negotiations with Irvine to procure a transfer of the tax title to Fair and Selover, whom Irvine then, for the first time, learned were anxious to secure the tax title to it (p. 241). Irvine demanded $20,000, which demand Sinton undertook to communicate to his principals, Fair and Selover, and

afterwards reported to Irvine that they wanted the property, but desired the title to remain in him for some time longer (p. 241); upon such understanding sundry items of expense attending the mine were at times, thereafter, reimbursed to Irvine by Fair. (pp. 241–242–43.)

In March, 1871, Irvine desired of Fair that he should pay him the purchase price and take a deed of the mine, but Fair deferred the matter (p. 243); and the matter continued along until December, 1871, at which time it was arranged between W. H. L. Barnes, acting for Fair, and S. M. Wilson, acting for Selover, and Irvine, that $5,000 should be paid to Irvine at once, $15,000 should be guaranteed to him in one year, and that Irvine should, upon those terms, convey the property. (p. 244.) Fair and Selover failed to complete the arrangement made by their attorneys, and October 1st, 1872, Irvine notified them by letter that unless definite arrangements were made with him on or before the 1st of the ensuing November he should consider the arrangement made with Messrs. Barnes and Wilson as abandoned. (p. 287, p. 245.) The notification was discussed between Sinton and Irvine on the steps of the custom house; Sinton was anxious the notification should be sent, as it would, he thought, tend to expedite the transfer of the mine to Fair and Selover, in which event, Sinton had informed Irvine, he, Sinton, would have an interest with Selover. (p. 246.) When the time limited in the notification had passed, and no reply had been received, Sinton complained to Irvine, and stated that he had been connected with the mine from early days, and that Fair and Selover, refusing to comply with the terms of the contract, *let him entirely out* (p. 246); whereupon Irvine made the remark, "Dick, don't feel so bad about it; if I ever sell this property for a large amount of money you shall not be forgotten" (p. 246); this was in November or December, 1872, and Sinton then told Irvine that he, Sinton, had received replies to the notification from

Fair and Selover, and that they had declined having anything to do with the property—to let the mine go to hell. (p. 246.)

March 27, 1874. Irvine received a dispatch, calling him east upon important business. (p. 248.)

March 28th, 1874, Sinton handed to Irvine the body of Exhibit No. 2. Irvine looked at it and said, "Why, Dick, you have got no interet in this mine, and I wont sign this paper;" whereupon Sinton reminded Irvine that he had promised to do something for him; that he, Irvine, was going away, and if he should die before his return that he, Sinton, had nothing to show that Irvine had ever promised to do anything for him, whereupon Irvine agreed to sign the paper and leave it with T. K. Wilson, to be delivered to Sinton only in the event of Irvine's death before returning to the State, (p. 247); they proceeded with the paper to Mr. T. K. Wilson's office, and the paper was so signed and left with said Wilson (p. 248). Irvine started East the next day, March 29, 1874, and returned to the State alive, on the 27th of July following, (p 248.) Four or five days after his return Irvine demanded that Wilson should deliver the paper into his possession (248). Wilson went to get it, but not readily finding it among his papers, he told Irvine he would hunt it up and hand it to him as soon as he found time (p. 248). Irvine said all right, and did not get the paper (p. 248).

Argument on Demurrer to Complaint.

A demurrer will lie to the bill of complaint in this cause upon the ground that the facts stated do not constitute a cause of action.

The basis of the action, as set out in the complaint, is a right by plaintiff to have Irvine account to him upon the happening of certain contingency.

1st. A sale by Irvine of one-half of the "Morgan mine," for a sum sufficient to repay to him all his necessary expenses in connection therewith, and leave a *net* surplus over.

2d. Any other disposal of said half of said mine by Irvine, which should result in the receipt by Irvine of a sum sufficient to repay to him all such necessary expenses and leave a *net* surplus over.

The complaint does not show that Irvine has sold said one-half of said Morgan mine, or that he has otherwise disposed of the same.

There is no attempt to show a *sale* of the property, by Irvine. The effort is to show that it has been otherwise disposed of; and the allegation, in that regard is, in substance, that Irvine and the owners of the other one-half of said Morgan Mine *formed themselves* into a corporation, under the laws of California, the alleged purpose of which was "to *sell* or work and develop" the said mine; that the title to the property was transferred to the corporation, so formed, and the capital stock of the corporation was distributed among the part owners of the mine, the corporators, in proportion to the interests which they held and owned in the mining property, and, so far as appears, no transfer of any of the stock has at any time been made, the original owners of the mine now being the owners of the stock of the corporation, as the same was originally issued to them.

Such a proceeding does not, we think, constitute a disposal of the one-half of said mine by Irvine in any just sense and within the meaning of the language of the complaint as set out in sub-division, Exhibit A, thereof.

The corporation, when the mine was transferred to it, became the holder of the naked legal title, holding the same as trustee for the part owners who had made the conveyance and who, as corporators and owners of the entire capital stock of the corporation, held an irrevocable power

of attorney to act as the attorney in fact of the corporation trustee.

The beneficial interest in the mine still remained in the part owners; they were not one dollar richer by the transaction; they held the control of the mine as fully as they did before.

How, then, can that proceeding be a disposal?

But should we be in error as to the fact of *disposal*, the complaint is yet insufficient, in that it fails to allege the happening of that contingency, upon which *alone* plaintiff, by said Exhibit A, was to have a right to demand from Irvine an accounting and division of the proceeds of a disposal, to wit: That Irvine has in his hands a *net* surplus resulting from the *sale* or *other disposition* of said one-half of said Morgan Mine.

The language of the complaint—subd. 2 is, "and it was then and there further agreed between said defendant, Irvine and said Sinton, *that all necessary expenses, including counsel fees theretofore incurred*, or that might thereafter be incurred, in and about the property, up to the time of such sale or other disposition thereof, *should be first paid out of the proceeds of such sale or other disposition* before division of the proceeds."

The complaint sub-division, Exhibit A, shows that Irvine had incurred expenses prior to the claimed disposal of the mine to the corporation, which occurred on April 9, 1875,—for Exhibit A, which is of date March 28, 1874, uses the following language:

> "All necessary expenses, including counsel fees *heretofore incurred*, * * * to be first paid before distribution of such proceeds."

There is no allegation in the complaint that such "*heretofore incurred*" *expenses* have ever been paid out of the

proceeds of such sale or other disposition of said one-half of said mine, or at all.

There is no allegation that Irvine has ever received from said mine, its sale or other disposal, one dollar which could be applied by him toward the payment of such incurred expenses.

There is no allegation that Irvine could ever at any time have sold or otherwise disposed of said one-half of said mine, or the proportion of its capital stock held by him, for any sum of money whatever, much less for a sum sufficient to pay all the necessary expenses incurred, and provided to be first paid by said Exhibit A.

No tender of a sum sufficient to pay such expenses is alleged, nor is an offer made to pay into court a sum sufficient to pay the same.

The tender alleged, and the offer set out, are each of a sum sufficient to pay *one-half* of such expenses only, and there is no allegation that if Irvine delivered to plaintiff one-half of said stock upon the payment by plaintiff of one-half the expenses, that then in such case Irvine could, from a sale or other disposal of the remaining one-half of said stock, procure a sum sufficient to pay the other one-half of such expenses.

We submit that it is absolutely necessary that the complaint should show that Irvine has received, or could, but for improper conduct on his part, have received from the sale or other disposal of said one-half of said mine or of said stock, a sum sufficient to pay all such expenses.

No such allegation appears, but instead, *it is alleged "that the said capital stock has no ascertained or market value."* No *net proceeds* are shown to be in the hands of the defendant, Irvine, or to have been received by him, nor is it shown that such proceeds could ever have been obtained by him.

It will not, we think, be contended that the want of such

allegations in the bill of complaint has been supplied by the proof, were it possible to do so.

We submit that the complaint is fatally defective, and that defendant is entitled to go hence without day and with his costs.

ARGUMENT UPON THE TESTIMONY.

First. Defendant contends, that if any cause of action is proven against Irvine by the evidence in this case, it is an entirely different one from that alleged in the complaint.

The complaint alleges that the property was acquired by Irvine and Sinton by their mutual efforts and at their mutual expense, and for their common and equal benefit, and pursuant to an agreement between them to acquire the title and sell or dispose of the same, and to share equally the profits and losses arising thereupon. (p. 1.)

The proof is directly the contrary.

"Q. 642, to Mr. Sinton. Was that property, the Morgan mine, acquired by you and Mr. Irvine at your mutual expense?

"A. No, sir; not at the expense of either of us.

"Q. 643. Then that allegation (subd. 1 of complaint) is not true?

"A. The allegation is true.

"Q. 644. How can an allegation that it was acquired at the mutual expense of yourself and Mr. Irvine be true, if it was not acquired at the mutual expense of yourself and Mr. Irvine?

"A. I suppose upon the proposition, generally; that a new order of things turned up, naturally enough, under this new order of things, when the notification was given by Mr. Irvine to Mr. Fair and Mr. Selover, as I had the verbal promise of Mr. Selover that when the thing was finally

settled, *he* would *give* me one-half of whatever interest or profit he should derive from the property; Mr. Irvine agreed that he would do the same thing and account to me for *one-half of whatever he would get out of the profits;* that is the plain explanation of the whole affair." (pp. 161–62.)

Irvine's title to the Morgan mine was acquired through a sheriff's deed, executed in pursuance of tax proceedings, by the sheriff of Calaveras county, at as early a date as *July, 1870.* (p. 102.)

Sinton states that he had no interest in the Morgan mine in the *year 1871.* (Ans. to Q. 370, p. 138.)

The so-called declaration of trust, *written by said Sinton March 28, 1874* (p. 106), uses the following language, to wit:

> "This is to declare that I, William Irvine, of San Francisco, California, *am the owner* of an undivided half of that certain gold-bearing quartz lode or mine * * * known familiarly as the Morgan Mine." (pp. 5–6.)

The conveyance from Sinton to George P. Ihrie, written by Sinton (p. 111), of date September 8th, 1874, declares that his interest in the said Morgan mine was *derived to him* by virtue of the said declaration of trust of date the 24th day of March, 1874; said declaration of trust being an instrument deposited in *escrow.* (p. 279.)

Sinton also states that, previous to the claimed, verbal agreement with Irvine at the time Irvine sent the notification to Fair and Selover, October 1, 1874, he, Sinton, was without any *status* or standing anywhere, with anybody. See ans. to Q. 396, p. 140.

Sinton, in proceedings subsequent to execution in the case of *Murphy* vs. *Richard H. Sinton*, in the Justices Court of the City and County of San Francisco, on or about the 24th day of *November, 1871*, swore that he had no property of any kind. See answer to questions 618–19, p. 159.

Sinton also states that when Irvine showed him the notification to Fair and Selover, he, Sinton, assuming that an abandonment had been made by Mr. Fair and Mr. Selover, *the tax title then vested in Mr. Irvine*. Answers to questions 814–16, p. 176, 177.

The title to be acquired, subject to the agreement alleged, cannot be the one-half interest which Irvine *retained* as the result of his compromise with said Addison and others, *April 14, 1873*; nor can such title be the patent for the mining ground issued by the United States *March 9th, 1874*, because, as before stated, Sinton, in the so-called declaration of trust which he wrote and procured Irvine to sign on the *28th day of March, 1874*, states that William Irvine is the *owner*, without qualification of any kind; and, nearly six months subsequent, in his conveyance to Ihrie, he states that his interest was *derived to him* by said so-called declaration of trust of date the 28th day of March, 1874.

There is, then, no proof of any title acquired under such agreement as alleged.

What is the force and effect of the declaration of trust so called.

No interest in said "Morgan Mine" was conveyed by said declaration of trust, because no consideration for its execution is alleged, or proved, and because it never was completely executed by delivery to Sinton. No delivery of it is, in terms, alleged, but it is left to be inferred from the forced language, "executed to said Sinton," and no delivery of it to said Sinton is shown by the proof, but, instead, all the testimony shows that it never passed out of the constructive possession of Irvine. The paper, upon its face, does not contain the usual phrase of a completely executed conveyance, to wit: "signed, sealed, and delivered in the presence of."

The document being made without consideration, no interest would pass until delivery.

Parker vs. *Parker*, 1 Gray, 409;
Merriam vs. *Leonard*, 6 Cushing, 153.

The delivery of a written contract is indispensable to its binding effect, and is not conclusively proved even by showing a delivery to the grantee or obligee. It may be shown that it was not delivered for the purpose specified in it, without extraneous conditions first performed, or without the happening of a certain contingency, and this applies to all instruments from deeds to promissory notes.

Burton vs. *Martin*, 52 N. Y., 570.

What Interest has the Plaintiff?

Defendant contends that plaintiff has failed to show, by his proof, that he is entitled to any interest in the Morgan mine, or in the stock of the Morgan Mining Company held by defendant. All the interest which plaintiff shows, or attempts to show in himself, is so much as was conveyed to him from Sinton by the paper writing complainant's Exhibit No. 4, p. 278, and by that instrument the interest conveyed by Sinton and received by Ihrie and from Ihrie transferred to plaintiff by means of complainant's Exhibit No. 5, (p. 280), was so much and no more, as vested in Sinton by a declaration of trust executed by Willian Irvine, witnessed by H. J. Tilden and T. K. Wilson, and *deposited with and accepted by said T. K. Wilson in escrow* * * *, (p. 279.)

It will not, we think, be contended that a deposit of an instrument in *escrow* conveys any title or interest until the happening of the event or contingency which is to change the conditional delivery into an absolute one.

Plaintiff has not alleged the happening of such an event or contingency, nor has he proved it.

The proof is, on the part of defendant, that such event or contingency was the death of Irvine before his return to the State from his trip East and to Europe, (p. 220, which event the proof shows *did not* occur (p. 220).

If the allegations of the first sub-division of the complaint be conceded to be true, and if it be also conceded that some declaration of trust was executed by Irvine and delivered to Sinton, such concession would not help the plaintiff here, because, if Sinton in any such way acquired any interest in the Morgan mine, or in the stock of the Morgan Mining Company, so far as appears *he has it yet;* he did not pretend to convey any such interest to Ihrie by said Exhibit No. 4, (p. 279.)

Sinton graduated at the head of his class at the Military Academy of Virginia, (p. 152.) Ihire must be a graduate of "West Point," for he signs his deposition in this case as follows, to wit: George P. Ihire, Ex-Insp'r Gen'l, Staff of Gen'l U. S. Grant, late of the U. S. Army, Consulting Civil Engineer, (p. 98.)

Sinton had been a large dealer in real estate in San Francisco, continuously, since 1849—pp. 152-5.

Sinton wrote the conveyance to Ihrie, complainants, Exhibit, No. 4, p. 278; and Ihrie accepted it: the conveyance was nearly co-temporaneous with the fact which it recites, less than six months subsequent, and was made as security for an old debt owing from Sinton to Ihrie.

There is no ambiguity resulting from the words used in said conveyance, no other words could more clearly define the exact interest then held by Sinton, an interest "*derived to the party of the first part by virtue of a declaration of trust executed by William Irvine* * * *and deposited* * * *in escrow* * *.

If words, not intended, were put in the conveyance it may be that, in a proper proceeding, the deed could be corrected; but it is not seen how it is possible, in this action, to give to

the language of that deed any other than its plain, obvious meaning.

No importance is attached to the declaration of Ihrie that Irvine told him that Sinton was one-fourth owner of the "Morgan Mine," because, even were that the case, as we have before shown, it does not help the plaintiff, whose title rests upon so much interest as would pass from Irvine to Sinton by a document deposited in *escrow*, and also because these declarations were subsequent to the conveyance of Sinton's interest to Ihrie. p. 95.

No importance is attached to the declarations of Mrs. Sinton, that Irvine said to her, "Mrs. Sinton, keep a good courage; just as soon as your husband gets his title here he will have more money than you and he can spend;" because, first, that statement negatives an existing title, at that time in Sinton, which, if Irvine then acknowledged himself as Sinton's trustee, he would have had, and naturally, in speaking of it between themselves, they would have recognized as existing; and, second, Sinton told Irvine, in July, 1870, that he had an indirect interest with Selover in the mine (p. 265), and from that time until at least October, 1872, Irvine was holding the property under an agreement to transfer the same to Fair and Selover upon the payment, by them, of $20,000, in which event Sinton's title, spoken of by Irvine to Mrs. Sinton, would have been obtained by him through Selover. The circumstances to which she refers occurred between 1870 and March, 1872. (pp. 192, 197.)

Does the proof show the happening of the contingency.

Again, plaintiff fails to prove a cause of action against Irvine, because he fails to prove the happening of the contingency upon which, alone, as alleged in the complaint, said Sinton and assigns were to have a right to an accounting from Irvine.

Irvine promised and bound himself to account fully and truly to said Sinton, his heirs or assigns for the one half of all *net proceeds* of said one-half interest, and it was then and there further agreed between said Irvine and said Sinton that all necessary expenses incurred *should be first paid out of the proceeds* of such sale or other deposition *before division* of the *proceeds*. (Subd. 2 of complaint, pp. 1, 2.)

The proof shows expenses incurred. (Exhibit 2, p. 278.) Testimony of T. K. Wilson, (pp. 233, 36.) The decree finds the sum of $14,221.16 due to Irvine as one-half of such expenses (p. 84), and there is no proof that Irvine has ever received one dollar from the Morgan mine, or the Morgan Mining Company's stock, or from plaintiff or from any other source, toward the payment of such expenses.

There is no proof that Irvine ever had an opportunity to procure from the sale of one-half of the Morgan mine or from the stock of the Morgan Mining Company held by him, a sum sufficient to repay such expense. There is no proof that one-half of the said stock held by him, can, or ever could have been sold for a sum sufficient to pay one-half of such expenses.

There is no allegation, or proof of bad faith, or negligent, or incompetent management of the mine by the corporation or by said Irvine, and yet the proof shows that a series of assessments upon the stockholders have been resorted to. (p. 217.) No dividend has been declared, or, so far as appears, earned by the Morgan Mining Company, (p. 217), and the stock of the Morgan Mining Company has no ascertained or market value. (pp. 216,–17, complaint subd. 7.)

The proof not only fails to show the happening of the contingency, but it affirmatively shows that it has not happened.

In conclusion, we submit that the testimony shows conclusively that the said plaintiff, Dunham, had not, at the

time his complaint in this action was filed, any claim upon, or ownership in, any stock of the said Morgan Mining Company held by said defendant Irvine, and it also shows that said Irvine was not, then, the trustee of said complainant in any matter whatever.

We therefore pray that the decree of the said Circuit Court may be reversed, and that the appellant may recover his costs.

GEO. W. TOWLE, JR.,
Atty. for Appellant.

111-327

OFFICE SUPREME COURT U. S.
FILED
MAR 19 1884
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

No. 243—October Term, 1883.

WILLIAM IRVINE, *Appellant*,
vs.
SUMNER T. DUNHAM, *Appellee.*

BRIEF FOR APPELLANT.

JAMES M. JOHNSTON,
Of Counsel.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

In the Supreme Court of the United States.

No. 243—October Term, 1883.

WILLIAM IRVINE, *Appellant*,
vs.
SUMNER T. DUNHAM, *Appellee*.

Brief of James M. Johnston, of Counsel for Appellant.

It is not necessary to repeat the statement of facts which will be found fully set out by Mr. Towle, in his brief filed in behalf of the appellant.

The principle proposition in this brief on the part of the appellant is that the bill filed against him in this cause should be dismissed with costs, because of the vagueness in the allegations and proofs respecting the contract relied on by him, and the variance between the Complainant's allegations and proofs.

There is great confusion in the bill of complaint in the statement of Complainant's cause of action. There are no less than four independent contracts involved and referred to in the first two paragraphs of the bill, and it does not certainly appear on which of them Complainant relies. He cannot rely on all, because they are inconsistent in essential particulars. They cannot possibly co-exist, nor can they all be the basis of one title.

Considering the peculiar nature of Complainant's case, it would seem especially proper that his cause of action should be distinctly stated, and as distinctly proved. Nevertheless, it is believed to be defective in both particulars.

I.

Allegations to the Contract of 1869.

It is to be observed that no intimation is given in the first paragraph of the bill of complaint as to *the time* when the contract, set up in that paragraph, was made.

It becomes necessary, therefore, to refer to Complainant's testimony to learn when he claimed that bargains began to be made between Irvine and Sinton.

The facts in respect to this matter are fully stated in the brief of my associate counsel, Mr. Towle. (See his Brief p. .) But the bargain alleged by Complainant and sought to be proven by his witness, Sinton, is, in brief, as follows:

A. Gray Morgan, Addison, and others, acquired possession of the property in question, known as the Morgan Mine, from Ulrich & Nichols, the original discoverers. James G. Fair got control of Morgan's interest, and thus obtained possession of the mine. The State of California having taxed the possessory title thus acquired, Fair and Sinton, who were acting for Selover, (then in possession with and under Fair,) agreed to permit the property to be sold for taxes, and by buying at this tax sale, acquire a title paramount to that of Addison and his co-tenants, who had then sued to recover all interests in the mine except that enjoyed by Fair. (Rec. 119.) This bargain was made in 1869. (Rec., 102.) Irvine, it is said, was employed by Sinton to buy the property for Fairand Selover and Fair and Sinton endeavored to so arrange the plot that it would stand a judicial investigation, notwithstanding it was a purchase by Fair and Selover, *per interpositam personam*. Complainant

further says that, in 1869, the mine was thus purchased as agreed, and, in 1870, Irvine duly received a Sheriff's deed for the same. Irvine, it is said, refused to give up the property for the benefit ofFair and Selover, unless he was paid $20,-000.

Several facts are to be observed which indicate that this bargain of 1869 is the contract relied on in the first paragraph of the bill.

1. The consideration moving from Sinton to Irvine is said to be that the mining property was acquired by the "mutual efforts and expense" of Sinton and Irvine.

Sinton testifies that the mine was not acquired at the expense of either himself or Irvine, but at the expense of Fair. (Rec. 161, 162, Q. 642, 645, 646.)

This is the only pretence of support to the allegation in that paragraph, that expenses were incurred by any one connected with Sinton. So that the contract relied on in this paragraph would seem to be the one on which Fair made advances of money. Now this original bargain of 1869 is, according to Sinton, the only one in which Fair was concerned, or on which Fair advanced any money.

Before the next alleged bargain was made, Fair, according to Sinton's version, had no longer anything to do with the mine; or, if he did, no one pretends that he advanced any money by reason of the next bargain or in any way was connected with it.

The same remarks apply generally to the claim that Sinton's "services" were one of the considerations moving from him; but his "services" were rendered, according to his own testimony and theory, as a procurer of an individual to personate the "innocent purchaser" at the tax sale and similar work, all relating to the first alleged bargain of 1869.

2. The agreement between Sinton and Irvine, as alleged in the first paragraph of the bill, was to "acquire the title" to the property. That is, the agreement referred to antedated the acquisition of any title by Irvine. Now a title was acquired by Irvine by sheriff's deed in 1870. The only agreement prior to 1870, suggested by Complainant's witness, was the pretended bargain of 1869.

3. This bargain of 1869 is stated by Sinton in his testimony with the greatest particularity, and all its features are developed by questions from Complainant's counsel. If the contract relied on was long subsequent to this, (as is the contract next in order of date), why should these details have been brought out.? They are irrelevant and totally unnecessary and injurious rather then beneficial to Complainant. (Rec. 101, 102, 103.)

II.

Allegations as to the Contract of 1872.

The only other contract which could, by possibility, be referred to in the first paragr aph of the bill of complaint is one which is thus testified to by Sinton.

He says that, after Irvine had received the Sheriffs' deed for the mine, under the corrupt bargain to thus oust the Addison party of their rights therein, negotiations were entered into between Selover, Fair and Sinton and Irvine with the view of settling upon and paying the amount due to Irvine for his "services" in what Mr. Sinton daintily terms this "delicate operation." (Rec. 102.)

These negotiations were, according to Mr. Sinton's testimony, broken off temporarily, though they had progressed so far as to elicit an offer from Mr. Irvine to convey the whole property for $20,000. (Rec. 287.)

Mr. Sinton then proceeds to explain that no definite answer having been given to Mr. Irvine, the latter wrote the letter,

found on page 287 of the Record. Sinton further says that he learned from Fair and Selover that they had abandoned all idea of obtaining the mine, and that left Irvine the sole and undisputed owner. (Rec. 176, 177.)

An important question arises here. Is this *conclusive evidence* against Fair and Selover, whose agent and trustee Sinton was, of the final and absolute abandonment by them of whatever rights they had, not only under the conditional agreement to buy out Irvine's interest for $20,000, *but of whatever rights they had under the bargain of 1869, under which Irvine acquired the tax deed?*

Now, Sinton, according to his story, is a contracting party under the agreement of 1869, for he says that Irvine agreed *with him* as agent and trustee for Fair and Selover, to convey *to him* the whole mine. (Rec. 123.)

And is it not necessary that it should conclusively appear, both by the allegations of the bill and by the proofs, either that all rights of both Fair and Sinton, as agent and trustee, under the conditional agreement and the bargain of 1869 had been absolutely abandoned, or that they had not?

According to Complainant's testimony the corrupt bargain of 1869 did once exist.

If it is still in existence the rights of Complainant, who is Sinton's assignee, grow out of that exclusively. If it is was abrogated, then those rights arose subsequently to that abrogation.

Unless the court should be satisfied that the alleged contract of 1869 had been, when the bill was filed, absolutely and finally abandoned by Fair, it can do nothing in this case, because Sinton, being a party to that contract and privy to all the events, had full notice of every antecedent fact, when he undertook to contract for himself, *sui juris*, in 1872. If the contract of 1869 is in force, it is paramount and absorbs the whole property, so that there is nothing for Sinton to receive under the contract of 1872.

Moreover, Sinton, acting *sui juris*, could not ask this court to deilver to him property, which was his as trustee, under a paramount title.

III.

Proofs as to Contract of 1869.

If this alleged bargain of 1869 is the contract relied on, there are several reasons why complainant cannot recover, even on his own showing.

1. The scheme thus set up by Complainant's witness to deprive the cotenants of their rights, in the way mentioned, was a clear fraud on them.

Rothwell vs. *Dewees*, 2 Black., 618;
Manderville vs. *Solomon*, 39 California, 125;
Brown vs. *Hogle*, 30 Ill., 144;
Dubois vs. *Compan*, 24 Mich., 368;
Shell vs. *Walker*, 54 Iowa, 386;
Flinn vs. *McKinley*, 44 Iowa, 37;
Weare vs. Van Meter, 42 Iowa, 129.

The purchase, *per inter positam personam*, only intensifies the fraud and makes the whole transaction more absolutely illegal, if that be possible.

Michoud vs. *Girod*, 4 Howard, 503, 553, 560.

So that Sinton's proposition is that Irvine, Fair & Selover and himself, having conspired to defraud the rightful owners of six-sevenths of the property, and having, in fact, defrauded them of the difference between six-sevenths and one half, or five-fourteenths of the whole property; and the spoils thus acquired having come, by agreement, into the hands of Irvine, the latter shall be required, by a court of equity, to deliver up half of it to one of his co-conspirators.

This will not be decreed. The parties are, according to

plaintiff's own showing, in *pari delito*, and the court will leave them where it finds them.

Randall vs. *Howard*, 2 Black, 585, 588, 589;
Meguire vs. *Corwine*, 101 U. S., 108, 111;
Oscanyon vs. *Arms Co.*, 103 U. S., 261.

2. The contract is not proved by the Complainant as alleged.

(*a.*) Not as to the subject matter. The bill alleges that the contract relates to one-half interest in the mine; the proof states it to be the whole.

(*b.*) Nor as to Irvine's profit or benefit. The bill allows him an undivided one-fourth interest in the mine. Complainant's testimony is that Irvine was to be paid in money whatever his services were reasonably worth; that he demanded $20,000; and that it was refused because it was thought too large.

(*c.*) Nor as to Sinton's rights: In the bill he only claims an undivided one-fourth; in his testimony he says he is entitled to the whole, as trustee for Fair and Selover.

Other fatal variances between the Complainant's allegations and proofs as to the contract of 1872 could be shown. This proposition has been discussed on Complainant's own showing. Defendant does not at all admit the truth of Sinton's statement, and the evidence introduced by the former could be now readily referred to if it were deemed necessary to further disprove the contract thus alleged by the Complainant.

(*d.*) In his testimony (Rec. 138.) Sinton says, that in 1871, he had no interest of any kind in the property except what Selover should choose to award him as a mere gift. He does not pretend that at any time up to 1871 he had any claim under Irvine.

(*e.*) Complainant proves that Fair's rights have been

determined in the ejectment suit brought by Fair against Irvine. It is true that Sinton says that this judgment was collusive. But a judgment cannot be thus attacked collaterally in evidence only. It should either be set aside on motion in the court which rendered it or be directlyattached by a bill in equity filed for that purpose.

Mattingly vs. *Nye*, 8 Wallace, 373.

IV.

Proofs as to the Contract of 1872.

As has been said, this alleged contract cannot be considered unless the bargain of 1869 was absolutely and totally abandoned for all purposes, by all parties to it. As Sinton has testified as to the existence of the paramount contract of 1869, he must, to enable his assignee to recover on this one, satisfy the court in this case (in which Fair and Selover, his principals and *cestuis que trustents*, are not parties) that the contract of 1869 is absolutely abrogated by them, or is absolutely illegal and unenforceable as to them. Sinton cannot say that the previously existing contract had been abandoned by Fair and Selover (Rec., 176, ans. to Q. 814 and 815, Rec. 177).

But assuming the court to be satisfied that such abandonment was made by Fair, what was the situation in 1872?

According to Sinton, the scheme which had been concocted by Mr. Fair and himself had been so successful that it had not only held the Addison party at bay, but had resulted in the ouster of the rights of Fair and Selover as well.

Now Irvine denies this entire story. He says he bought and paid for the tax title. But the result is in either case the same so far as the ownership of the tax title is concerned, and so far as Fair, Selover, and their agent Sinton are interested.

Irvine, then, on October 1, 1872, was the sole owner of the tax title to the entire property.

Irvine so claimed and Sinton so regarded it (Sinton, ans. to Q. 814, Rec. 176), and Sinton thereafter dealt with Irvine on that basis. Finding this to be the situation, and that he could hope for nothing under the bargain of 1869, Sinton says he "was moved to protect himself" (Q. and Ans. 815, Rec., 176, 177).

The allegations in the first paragraph of the bill, relating to the contract of 1872, are:

(*a.*) As to the subject matter of the contract, that the agreement was that the legal title to a half interest in the mine was to be secured and taken in Irvine's name.

(*b.*) That Irvine's promise was to hold this half interest for the common benefit of himself and Sinton, they sharing both profits and losses.

(*c.*) And that the considerations for this promise were the mutual efforts and mutual expense of Sinton and Irvine in the acquisition of the property.

a.

If this allegation means that the agreement was to acquire for their common benefit a half interest only in the mine, this could not have been, for Sinton testifies that the agreement was made just after October 1, 1872.

At this time the Addison suit was in the form of a judgment against Irvine, for the whole property, (Rec. 272,) and the compromise which resulted in Irvine's receiving a half interest was not made until April, 1873. No such interest would have been contracted for then, nor could Irvine have held, as the bill alleges, the other half of the mine in trust for other persons.

Sinton recognized the fact that the only possible claim which he had to any personal benefit from, or interest in this property, was from Selover.

So that he asked Irvine in what situation the termination of the bargain of 1869 would leave him. (Rec. 140, Q. 391, 396.)

Sinton was informed by Irvine, he says, that he should receive the same interest which he would have received through Selover if the bargain of 1869 had been carried out; and that the claim on him should be of the same nature as his former claim on Selover. (Rec. 161, 162, Q. 644, 645; Rec. 140, Q. 391.)

Now Sinton's relation to Selover was that the latter had promised him verbally to give him a half of what he (Selover) got out of the mine. At the time this agreement is said to have been made, Fair and Selover had title to the whole mine. The half of what Selover would have received from the mine, would, if the Addison suit is not considered or had been defeated, have been one-fourth. Hence, Sinton says, that Irvine promised him a "quarter of everthing that comes out of the property." (Rec. 140, Q. 391.)

But one-half interest in the mine had to be given up to the Addisons to settle their claims, so that, according to Sinton's story, Selover's interest would have been only a half of the remainder, or one-fourth. Now if Sinton was to receive, as he says, half of that interest, his utmost claim would be an eighth.

Assuming, therefore, that Sinton's statements are correct, he has not proved the allegation that a half interest in the mine was to be taken in trust for himself and Irvine, but he has shown that under no circumstances could he have obtained more than one-eighth.

b.

Not only is there this substantial variance between his allegations and his proof, but Sinton does not, in giving the terms of the agreement, mention anywhere in his testi-

mony that he was liable for losses in the enterprise beyond the value of the property,—but that is the allegation in his bill. This is certainly an important feature, and with the rest shows the variances between the contract alleged, and that testified to by Sinton or otherwise proved by Complainant.

c.

As to the consideration for Irvine's promise. Sinton says, that the promise by Selover was verbal, and without consideration. He also says that he occupied the same relation to Irvine, after the agreement of 1872, that he had formerly occupied toward Selover. (Rec. 161, 162, Q. 644, 645.)

Of course this promise would not have been enforceable against Selover, and it is difficult to discover why it should be enforceable against Irvine, who, according to this testimony of Sinton, voluntarily renewed a purely voluntary promise.

With respect to the consideration set up by complainant, Sinton says, as to the "mutual expenses:"

"He first undertakes to dodge the questions and throw the responsibility of the allegation on his own counsel." (Rec. 162, 163, especially Q. 647.)

And next, Sinton admits that he never paid or advanced a dollar for this purpose. (Rec. 155, 156, 161, 162.)

If Fair, Selover and Sinton had abandoned the contract of 1869, and the option to purchase for $20,000 (both of which are necessary to sustain any action on the contract of 1872,) it is plain that all benefit of whatever money or services had been paid or rendered by either Fair or Selover, or Sinton, as their agent, became thereby lost. Those advances or services would be voluntarily forfeited to Irvine.

They could not, therefore, furnish any consideration for a new and inconsistent contract made by Sinton, *sui juris*,

and which was not intended to, and did not enure to the benefit of either Fair or Selover.

The only other "services" said by Sinton to have been rendered by him are consulting Irvine as to the terms of the agreement of compromise with the Addison party, and writing a letter to a claim agent in Washington with respect to a U. S. patent for the Morgan Mining property.

These are trifling considerations. They are denied by Irvine, and evidently are not those intended by Sinton in the bill. He evidently referred to Fair's advances of money, and to his own services in procuring the tax title, not remembering how complicated and numerous his supposed contracts were, nor how essentially inconsistent his attitudes were.

V.

The alleged Contract of March 28, 1874.

In the second paragraph of the bill Complainant alleges that on March 28th, 1874, Sinton and Irvine entered into an agreement with reference to an undivided half of the property then held by them equally, as before mentioned, under which Irvine agreed to hold said property equally for himself and Sinton, and bound himself to account to said Sinton for half the net proceeds.

It is to be observed that Sinton does not pretend that the so-called declaration of trust was that contract. It is not so claimed in the bill, but the clear intimation there is, that this exhibit was executed as a consequence or in pursuance of the previous agreement. (Par. 2 of Bill, Rec., 2.)

Sinton's testimony is to the same effect. He says, "Mr. Irvine was going off to the East and to Europe, and *as there had been nothing between us but a verbal agreement thus far*, I drew the paper." In his testimony he says, "I *drew* the paper setting forth the facts, so there would be some writ-

ing *showing the relations to the property that existed between him and myself.* (Rec., 106, Q. 35.) And again, Sinton says, that Irvine stated when Exhibit A was signed by him, "that he would execute it and leave it as matter of evidence of the existing relations," (Rec., 106, 107,) &c." He then says that the paper was examined by both himself and Irvine, at the former's office; that Irvine objected to delivering the paper to him, but said it was right; to which Sinton assented; and then he adds, "*we proceeded immediately to Mr. Wilson's office*, where the paper was executed, and * * * left with Mr. Wilson," &c. (Rec., 106, 107.)

It appears from the above, that the agreement of the 28th of March, which is relied on, was the conversation between Sinton and Irvine at the latter's office, before going to Mr. Wilson's office. As to any such conversation sustaining the alleged agreement, it is answered—

1. That Irvine denies it. (Rec., 247.)

2. No support is given to it by anything that transpired in Mr. Wilson's office at the interview referred to.

3. It is not consistent either with the allegations of the bill or the proof as to the terms of the contract.

In truth, the testimony of Mr. Sinton, cited above, shows that the previous contract, on which he means to rely, was one prior to March 28, 1874. He says, in speaking of the preparation by him of this declaration of trust, (and this was before the interview at Sinton's office,) that, "as there had been nothing but a verbal agreement thus far," he prepared Exhibit A. (Rec., 106.)

As it thus appears, the previous contract, of which Exhibit A was intended as a memorial, was some other than the alleged agreement of March 28, 1874. If so, there is a variance between the allegations and the proof, and a total defect of proof as to the terms of such antecedent contract.

Bearing in mind what has been said as to the allegations

in the bill and the testimony mentioned, can the court announce with any degree of certainty whether it is the alleged contract of 1869 or that of 1872, which is sought to be established?

As has been said, the vague allegations of the bill are divisible into, or may be applicable to four distinct contracts, but no one of these contracts has been proved as alleged.

As has been abundantly shown, there is in every instance a fatal variance between the allegations as to (1) Irvine's acts or promise, or (2) Sinton's acts or promises, or (3) the subject matter of the contract.

The moral offenses charged by Dunham against Irvine are so gross that they should be both distinctly alleged and proved. Certainly the rule "*secundum allegata et probata*," should be applied here. That familiar doctrine has been tersely laid down by this court in language peculiarly applicable to this case, and as follows:

> "In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged and not proved."
>
> *Fisher* vs. *Goddard*, 1 Black., 518.
>
> "If proofs go to matters not within the allegations, the court cannot judicially act upon them, for the pleadings do not put them in contestation."
>
> *Harrison* vs. *Nixon*, 9 Peters, 503; and see *Simms* vs. *Guthrie*, 9 Cranch;
> *Boone* vs. *Chiles*, 10 Peters, 208, 209, 210.

Nor will the court permit a Complainant, who fails to sustain the particular theory and allegations of his bill, recover because he appears to have some general equity, or to be

entitled to some consideration at the hands of the court

Eyre vs. *Potter*, 15 Howard, 42;
Fisher vs. *Boody*, 1 Curtis, C. C., 206;

It is, also, to be observed, that no explanation is any where given why the allegations of the bill should embrace several distinct agreements. They cannot co exist, not only because the allegations as to promise, consideration and subject matter are not consistent with the allegations or proofs, but because the latter contracts could not be entered into except on the assumption that the first were absolutely and for all purposes abandoned.

It would appear as if the hope of Complainant is that if the court will not grant him relief on one contract it will on another, though the two contracts cannot co-exist, and may be inconsistent.

Such a bill is framed with a double aspect, and can be the foundation for no relief whatever.

Shields vs. *Barrow*, 17 How., 143, 144;
Jackson vs. *Stickney*, 107 U. S., 484;
Colton vs. *Ross*, 2 Paige, 397;
Lloyd vs. *Brewster*, 4 Paige, 539, 540, 541;
McBrayer vs. *Roberts*, 2 Devereux Eq., 77, 78;
Gunnell vs. *Cockrell*, 84 Illinois, 323.

If none of the foregoing contracts exist, as alleged, then it cannot be true that the declaration of trust could have been given in accordance with any antecedent agreement, as claimed.

That paper was executed without any consideration and independently. Could it have been given otherwise than as claimed by Irvine?

That this paper was delivered in *escrow* and to be effective only in the contingency of Mr. Irvine's death, when on

his contemplated trip to the east and to Europe, is confirmed;

1. By the recital in the deed from Sinton to Thrie, that the paper, Exhibit A, was delivered in *escrow*. (Rec. 279.) This deed was prepared by Sinton. (Rec. 111.) Sinton attempts to break the force of the fact, by his statement that he did not know the meaning of the language which he himself wrote. (Rec. 112.)

But he shows that he is a man of education and experience in transactions relating to real estate. (152, 153, 154, 155.) Moreover it must be remembered that Dunham puts this deed in evidence as a link in his chain of title.

> "Where the deed is offered in evidence by the plaintiff, in order to derive to himself a legal title under it, the interests and estates thereby conveyed cannot be enlarged or diminished by testimony *dehors* the record. The deed must speak for itself."
>
> *Lessee of Smith* vs. *McCann*, 24 Howard, 406, 407.

2. Testimony of T. K. Wilson, Rec. 219, 220.

3. Testimony of Irvine, Rec. 247, 248.

4. The acts of all the parties in construing this agreement. Irvine demanded the paper immediately on his return from the East.

Wilson said he would give it to him but could not find it immediately. (Wilson Rec. 220. Irvine Rec. 248.)

Sinton never did demand it and the paper was brought into the record by a *subpœna duces tecum* served on Wilson. (Rec. 101, 106.)

VI.

There is only one question remaining to be referred to in this brief.

Can this Court enforce *as a trust* the so-called declaration

of trust, notwithstanding the objections already mentioned, and those which follow.

It is maintained that it cannot be done, because this paper, considered as a declaration of trust, is executory and not executed.

1. Because what was done by Irvine in respect of this paper never was intended by him to be final and binding on him; but he contemplated further acts to be done, and contingencies to happen, to give completion and effect to the deed.

Adams vs. *Adams*, 21 Wallace 191, 192, 193;
Perry on Trusts, §103, authorities cited;
Neves vs. *Scott*, 9 Howard, 212;
County, &c., vs. *American Emigrant Co.*, 93 U. S., 127.

This intention is gathered from the circumstances surrounding the transaction, and in this regard delivery is important, and is very often a controlling circumstance.

Perry on Trusts, §103, 21 Wallace, 191, 193, 196.

That Irvine had no such intention, is evident from the testimony of himself, T. K. Wilson and Sinton, already referred to on the subject of the conditional delivery of that paper. And that Sinton so understood it is plain from his recital in his deed to Ihrie.

2. Because the alleged trust declared by Irvine is not a fully accomplished act, but further acts must be done by him to give effect to the trust.

The theory of Complainant's bill is, that Irvine reserved, in the declaration of trust, the power "to sell or otherwise dispose of" the half interest in the mine; that the exchange of it for one-half of the stock of the Morgan Mining Company was a lawful "disposition" under that power; that the stock so received by Irvine stands in his name and that he is a trustee as to such stock.

This is, therefore, on Complainant's theory, a declaration by Irvine that he holds one-half the said stock in trust for Sutton's assignee. But this is an executory trust.

1 Perry on Trusts, § 100;
1 Story Eq. Jur., § 433, note 3, and § 793;
Tudwell vs. Constable, 8 Simonds, 69;
Ellison vs. Ellison, 6 Vesey, 662;
Antrope vs. Sutton, 12 Ves., Jr., 45;
1 *White and Tudor*, Leading Cases, 41–42.

If the trust is executory, it will not be sustained unless it be founded on a valuable consideration, except in favor of a wife or child.

Perry on Trusts, § 97 § 98, note 3 (p. 90);
Stone vs. Hackett, 12 Gray, 227;
Hill on Trustees, 83 and note *n*.

It will be observed that the Exhibit A is apparently under seal. This makes no difference, however, in considering the question of consideration, not only because, under the laws of California, the consideration may be enquired into, but because, in equity, no additional force is given, because the alleged agreement is evidenced by an instrument under seal.

Adams' Eq., 178.

It is respectfully submitted that the decree entered herein should be reversed and the cause remanded with instructions to dismiss the Bill of Complaint.

JAMES [illegible] JOHNSTON,
Of Counsel for Appellant.

11-327

OFFICE SUPREME COURT U. S.
FILED
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

No. 243.

WILLIAM IRVINE, Appellant,

vs.

SUMNER T. DUNHAM, Appellee.

BRIEF FOR APPELLEE,

By SHELLABARGER & WILSON,
Attorneys.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

WILLIAM IRVINE, appellant,
vs.
SUMNER T. DUNHAM, appellee. } No. 243.

BRIEF FOR APPELLEE.

We have not as yet (February 28, 1884) received any brief of the appellant in this case, and therefore are not advised upon what grounds the reversal of the case will be asked.

As it is important to the interests of the appellee that this litigation shall be ended, we will endeavor to present, for the consideration of the court, the points upon which we presume the appellant is relying.

The following is a statement of the facts:

STATEMENT.

This case is one in equity brought by the appeal of the defendant below, William Irvine, to this court from the decision of the Circuit Court for the district of California. The proceeding was commenced February 25, 1876, by Sumner T. Dunham, the appellee, in the District Court of the 19th judicial district for California. The case was, on the petition of said Irvine, appellant, (R., p. 16,) removed to the Circuit Court, on the ground that the plaintiff, Dunham, was a citizen of New York, and that Irvine is a citizen of California.

The object of the bill is to set up, declare, and establish,

by the decree of the court, a trust in the defendant Irvine in favor of the complainant Dunham, in five thousand shares of the capital stock of the Morgan Mining Company. The only answer we need here notice is that of William Irvine, appellant, (R., pp. 11 to 16.) This answer is one denying all the material allegations of the plaintiff's bill, denying the trust wholly, and alleging that the written instrument of trust, (R., p. 278,) also Exhibit A, (R., pp. 5 and 6,) was never delivered in fact to Richard H. Sinton, under whom Dunham, by mean conveyances, acquired title, and in the 7th paragraph of the answer (R., pp. 14 and 15) it is alleged in substance that the said instrument of trust, Exhibit A, was delivered to T. K. Wilson, attorney for Irvine in escrow, to be delivered to said Sinton in the event that Irvine should die on his trip, about to be commenced, to the Atlantic States, and never return to California; and that this declaration of trust was a mere gratuity, and that he did return, and that the same instrument never became operative, because it was never delivered.

The existence or non-existence of this trust is the whole issue in the case. It is stated by Irvine, (R., p. 49,) the pleadings and the complainant's testimony present the single issue, was the execution of this document, the so-called declaration of trust, completed by delivery? We say the issue rather is, was there a trust such as was decreed by the court below in Irvine in favor of Sinton and his assigns?

The following dates and transactions will be useful in the outset to recapitulate:

1876, February 25. The petition of Irvine filed in the 19th judicial district of California.

1876, February 25. Injunction allowed by Judge Wheeler, (R., p. 76.)

1876, April 1. William Irvine's answer filed in the 19th judicial district court, (R., p. 11.)

1876, April 1. Petition by Irvine filed to remove case to the United States District Court, (R., pp. 16 to 18.)

1876, May 25. Clerk of the State court certifies to the removal of the case to the Circuit Court, (R., p. 22.)

1878, April 29. Interlocutory decree rendered by the Circuit Court establishing the trust in favor of Dunham and against Irvine in the half of 9,994 shares of the capital stock of the Morgan Mining Company subject to claim of said Irvine against the said half for all necessary expenses referred to in the declaration of trust, and the case was referred to L. S. B. Sawyer, a master, to take and state an account of the necessary expenses, including counsel fees incurred before the 28th of March, 1874; also those thereafter incurred up to the time of the conveyance of the property by Irvine to the Morgan Mining Company, and the master to allow complainant Dunham just allowances for money paid by him or by his assigns or grantors, Geo. P. Ihrie and Richard S. Sinton, or other persons, by their or either of their request, for the benefit of the mining property, and to state what balance shall be due from complainant to Irvine, and in taking and stating the account before the master, either party was at liberty to use any of the evidence heretofore taken in this case, and to introduce other evidence, and the master to make his report touching the matters referred to with convenient speed, and upon the coming in of the master's report, and the payment by Dunham to Irvine the amount determined by the court to be due on said accounting, it was ordered that Irvine do assign and transfer to complainant Dunham 4,997 shares of the capital stock of the mining company, and that the company cause the same to be transferred on the books to Dunham, and the injunction continued, staying the transfer of the 4,997 shares to any other one than the complainant, reserving the consideration of all further directions until the master shall have made his report, etc., (R., pp. 46 and 47.)

1878, August 1. Irvine filed in the Circuit Court his petition for a rehearing, (R , pp. 48 to 51.)

1878, August 20. The petition for rehearing was denied and an order amending the interlocutory decree entered; this amendment requiring the master to report the assessments paid by Irvine on the said mining stocks, and report the facts relating to said payment as may be necessary for the information of the court on the question of the liability of the complainant for the payment of the said sums, etc.

1871, April 30. L. S. B. Sawyer filed his report, (R., pp. 79 and 80,) which report is found on pages 52 to 80. It appears by the report, top of page 56, that, counsel for the complainant offered in evidence the testimony before the master heretofore taken in the court and now on file in the case, referring to the payments and disbursements made by the several parties, so that it does not appear that any other depositions were put in evidence before the master, except such as referred to the payments and disbursements made by the several parties, and although the depositions taken in the court are embodied in the record, we find nothing authorizing them to be so embodied, except the facts above stated, namely, that the interlocutory decree (R., p. 47) authorized the parties to use any of the evidence before the master heretofore taken in the case, and that the attorneys for Irvine did introduce before the master only said depositions as referred to the payments and disbursements made by the parties, top of page 56.

1879, May 29. Irvine filed exceptions to the master's report. (R., pp. 80 and 81.)

1879, September 10. An order was made amending the master's report in some particulars.

1879, December 16. Further order was made by the court regarding the master's report.

1879, December 24. The final decree was entered. (R., pp. 83 to 85.) This decree declared that Irvine held in trust for Dunham the half of 9,997 shares of the capital

stock of the Morgan Mining Company, these 9,997 shares being the gross proceeds received by the defendant for and as the consideration of a conveyance and disposition by him to the said mining company of the one-half of the mining property called the Morgan mine, referred to in the declaration of trust dated March 28, 1847. The court further held that the said half of said shares were subject to the claim of Irvine against Dunham for one-half of the necessary expenses referred to in the declaration of trust, which amount to $442.33 and interest, and for one-half of the assessments paid by Irvine and interest chargeable thereon, all of which sums, including interest, amounted at date of decree to $14,221.76, and the decree ordered that on the payment of said last-named sum, with interest at 7 per cent. from date of decree, within 60 days from date of decree, payment to be made to Irvine or the clerk of the court. Then Irvine was decreed to assign to Dunham or his legal representatives 4,998½ shares of the said capital stock.

1874, March 28. Declaration of trust made by Irvine. (R., pp. 5 and 6; also 278.)

1874, September 8. Richard H. Sinton conveyed to George P. Ihrie all his right, title, and interest in that gold-bearing quartz lode or mine in Calaveras county, California, on Carson hill, known as the Morgan mine, the interest being an undivided quarter of the whole, declared by a declaration of trust by William Irvine dated May 28, 1874, pages 278 and 279.

1875, June 29. George P. Ihrie quit claims to Sumner T. Dunham all his right, title, and interest in said Morgan mine. (R., p. 280.)

1874, March 9. Letters patent were issued to William Irvine by the United States for said mining property known as the Carson hill or Morgan mine. (R., p. 281 and .)

1875, March 12. C. H. Butts, William Irvine, Robert

Irvine, Henry D. Bacon, and Thomas Brown formed a corporation known as the Morgan Mining Company, (Rec., pp. 281 and 282.)

1873, April 14. An agreement of compromise was entered into regarding the said Morgan mine between William Irvine on the first part and Henry D. Bacon, William A. Addison, Frank L. Coffee, John Coffee, Henry D. Irvine, Charles D. Buttes, William Hance, and John Hays, second party. This agreement is one which provides for William Irvine going forward and procuring a patent from the United States for the said mine, and providing that said Irvine and Bacon shall endeavor to sell the said mine on such terms as they may agree upon, Irvine to make a deed therefor to the purchaser, and when sold the proceeds to be divided 38-1792 parts to the heir of Duncan W. Smith and the residue of the proceeds to be divided equally, one-half to Irvine and one-half to be paid to Henry D. Bacon for parties of the second part. This agreement also stipulated that if a corporation should be agreed upon that Irvine should convey to the corporation, etc., (Rec., pp. 271–276.)

1875, April 9. William Irvine makes a deed for the said mining property to the said corporation Morgan Mining Company, in which it is recited that the capital stock of the said mining company is twenty thousand shares of one hundred dollars each. This deed makes the said contract of compromise of the 14th of April, 1873, a part of it and adopts its terms.

1876, February 23. Appellee Dunham wrote appellant Irvine, notifying him that he claimed five thousand shares of said capital stock, being half the number of shares issued to Irvine in consideration of his conveyance of an undivided half of said mine, Dunham notifying Irvine that he claimed as successor in interest to said Sinton under the agreement theretofore made between Irvine and Sinton, respecting the property issued under said declaration of trust

asking for an account of expenses, including counsel fees, and offering to pay the same, and also offering to pay for all assessments on said five thousand shares demanded; also demanding the conveyance of the said shares.

1871, December 6. Exhibit No. 10 attached to complainant's deposition (R., p. 286,) is a memorandum made by Sinton on the day of its date, saying that he had brought together Barnes, Sam Wilson, and Irvine at Barnes' office, with a view to reach an understanding about the tax title to the Morgan mine; there was a discussion; Irvine stated his *ultimatum*—$5,000 cash and $15,000 guarantee in twelve months, whereupon Wilson wished to advise with Selover, of New York, and the meeting adjourned to Saturday, the 9th.

1872, October 1. Complainant's Exhibit No. 11, (R., p. 287,) Irvine's letter to Selover, Fair, and Thomas Brown, saying that he had verbally agreed with Wilson and Barnes, on behalf of Selover, Fair, and Brown, to sell them half of the Morgan mine on certain terms, and saying that as he had not heard from them on the subject, he notified them that he was still willing to carry out the terms, but as litigation had arisen he notified them that if no more definite arrangements be made by made by the first of November, 1872, he would consider the agreement which he had so made as abandoned by them, and he would not feel bound by it.

1871, March —. Exhibit No. 13 is a statement purporting to be a statement of the expenses incurred on account of the mine. This Exhibit No. 13 Irvine in his deposition (see p. 249) swears was in his handwriting, and on the same page Mr. Irvine, in his deposition which was delivered June 28, 1877, (see record, p. 238,) swears that on the 1st of September, 1874, five months after the date of the declaration of trust, "I, if anybody would pay me half the expense that I have been put to, would deed them half my interest."

1871, November 15. Check by Thomas Brown, trustee, cashier of the Bank of California, (R., p. 214,) to the order of Irvine for $950. (Exhibit 16, Record, p. 291.)

1871, November 20. Another check by said Brown, on the Bank of California to William Irvine, on account of said mine, for $198.50. These checks were paid to Irvine on account of disbursements up to the 20th of November, 1871, by Irvine on account of said mine, and they were paid over to Irvine by James H. Dane, the clerk of Barnes, the cashier.

1874, September 1. Tilden and Wilson, Wilson being the same T. K. Wilson with whom the declaration of trust was deposited March 28, 1874, commenced an attachment suit in the District Court for the third judicial district of California, against Richard H. Sinton and William Irvine for $10,000, gold coin, and in the affidavit commencing the attachment suit said T. K. Wilson swears that Tilden and Wilson were employed by Richard H. Sinton and William Irvine to render the services sued for, and that the services were rendered between the 29th of October, 1873, and the first of September, 1874, in defending certain suits, and for drawing, copying, and engrossing various instruments of writing, and for divers journeys about the business of the defendants, which became due on the first of September, 1874; said Wilson swearing that said services were rendered "at the especial instance and request of said defendants, Sinton and Irvine."

On pages 235, 236, *et seq.*, T. K. Wilson swears that these services were in and about suits regarding the said mine and about the affairs of said mine.

The foregoing facts embrace, we think, the leading facts outside the depositions of the present record; but there are others which we will notice as we proceed below in the discussion.

BRIEF.

The issue presented by the pleadings is, does the appellant hold the stocks in question in trust for appellee? And we assume that one question to be made by appellant is that he did not so hold it, the court below having, by its decree, determined that he did.

This presents simply a question of fact to be determined by the preponderance of evidence.

In support of the finding and decree of the court in this behalf we have—

1st. The instrument in writing signed by the appellant, dated March 28th, 1874, (Rec., pp. 5-6,) in which he declared that he held "said half interest equally for myself and R. H. Sinton, * * share and share alike," and in which he also bound himself to account to Sinton for the "one half of the net proceeds," &c.

2. The testimony of said Linton, beginning at p. 101 of the record.

Sinton's testimony in substance is, that the mine was in litigation, and in order to secure the title it was determined to procure a tax title. Sinton was acting as the agent of Mr. Selover, who, with James G. Fain et als., who were parties to the suit; that he, Sinton, arranged with appellant that the latter should buy the property in, in the interests of others; that appellant did indirectly buy it in, got a deed for it, and then by means of a writ procured possession. This was done by way of carrying out the design of getting title by means of a tax sale. That after all of this had happened appellant was informed that the transaction was for the benefit of Fain and Selover; that Irvine gave a statement of the amount expended by him—$105.19—which was paid to him by Mr. Fain through Sinton. Appellant demanded $20,000 for his services in the matter. (Rec., pp. 102, 103.)

That it was understood between him (Sinton) and appellant that their interests were to be equal, (p. 104); a patent from the United States was to be procured; negotiations were carried on with reference to settling the controversies and procuring the patent, in which Sinton and Irvine were acting conjointly. (Rec., pp. 104, 105.)

On the 14th of April, 1883, Irvine entered into an agreement with the other parties in litigation by which the matters in dispute were settled, (Rec., p. 105 and p. 271,) in procuring which settlement and agreement Sinton was an active party, and was constantly consulted by appellant. (p. 105.)

Subsequently the declaration of trust, &c., was executed as above stated.

After this there were frequent discussions between Sinton and appellant in relation to the disposal of the property, and Sinton paid appellant $400 on account of expenditures made by the latter, who subsequently rendered an account to Sinton for $910.25, giving credit for $400 previously paid.

Upon receipt of this account Sinton wrote to Fair giving the latter a statement of the account. (See p. 114.)

In brief, this testimony of Sinton is that he brought the matter of the purchase of the mine to the attention of appellant, procured the latter to purchase it, paid him money on account of expenses and disbursements in that behalf; that it was understood between them that they were to be jointly and equally interested; that they carried on all the negociations in respect of the management and disposal of the property, in conjunction with each other, upon that basis up to the time it was finally disposed of to the Morgan Mining Company.

3d. The testimony of George P. Ihrie.

Linton had conveyed his interest in the property to Ihrie, in consequence of which he says he had his interviews with

appellant, in the first of which the latter told Ihrie that Sinton owned the one-quarter of the mine, and in the second that he owned that interest subject to expenditures, amounting to about $7,000, which he wanted Ihrie to pay. (Rec., p. 95.)

This witness further testifies that appellant gave him an account of expenditures and charges on account of this mine, and he exhibits a copy of the account.

He says that appellant wanted him, as Sinton's assignee, to pay the one-half of disbursements, and said he was managing Sinton's one-quarter interest in the property for Sinton.

4th. The testimony of Mrs. Sinton, (p. 193.)

This witness testifies that appellant on two occasions came to see Sinton, her husband, in regard to this property, consulted with Sinton in relation to its management, etc. (p. 194-5.) His statements to her were in clear and distinct recognition of the fact that Sinton had an interest in the property. (See Q. 39, p. 196, and Q. 42, p. 197.)

5th. Mr. Barnes testifies (p. 198) that in the fall of 1871 appellant presented an account, against Brown and others who claimed an interest in the property, for expenses and disbursements made by him, and this was paid by two checks—one for $950, and the other for $198.50. (p. 198, 199.)

6th. This fact is further proved by the testimony of James H. Dane. (p. 201.)

7th. Henry D. Bacon testifies that appellant represented to him that Sinton was interested in the property, and said that he was about to convey or had conveyed to Sinton one-half of his interest. (pp. 208, 209.)

The evidence added by the appellant in opposition to this trust is substantially, first, Irvine's testimony, beginning on page 238.

The court will have observed that Sinton in his testimony says that he was introduced to Irvine by a Mr. Gatewood as being a man whom he could trust to procure this tax title. Irvine in his testimony also says that the matter was first mentioned to him by Gatewood, but he claims that throughout the entire business he was acting on his own account and not on the account of anybody else. He also testifies in substance that Sinton had no interest in the matter whatever, and that the declaration of trust hereinbefore referred to was a mere gratuity. He does not deny but admits the frequent conferences between him and Sinton. He admits having the interviews with Ihrie. He admits having given to Ihrie the account of expenditures and disbursements, as testified to by Ihrie, but undertakes to get rid of it partially by saying that that was given to him with reference to some proposed transfer of the property and the ascertainment of the amount of moneys that he had expended with reference to what should be paid him on account of such transfer. He also admits the payments of his account for expenses which were paid by Exhibits 16 and 17, and makes other important admissions in the same direction. He admits the interviews with Mrs. Sinton and does not pretend to deny that he stated to her what she has testified to. He does deny having made the admissions or declarations to some of the other witnesses.

It will be noticed on page 249 that in his conversation of September 1, 1874, about five months after the intrument of trust A, Mr. Irvine expressly declares in these words:

"But," said I, "Mr. Ihrie, if anybody would pay one-half the expenses that I have been to I would deed to them half of my interest."

Then, on cross-examination, p. 260, he repeats that he did make that statement, and made it in good faith. (Answer to question 245.) So that he expresses his willing-

ness at the time the paper was executed, and for months thereafter, to execute precisely such a paper as the declaration of trust is. In relation to the conversations between him and Sinton, at Sinton's house, as to which Mrs. Sinton testifies, he says at page 250, question 126:

"Was there anything connected with the Morgan mine in your visit?

"Ans. There may have been some conversation in regard to it, but I do not remember the particulars of the conversation; the probability is, there was something said about it."

Then, again, question 128:

"Do you recollect saying to Mr. Hinton on that occasion: 'Keep a good courage; just as soon as your husband gets his title here he will have more money than you and he can spend,' or words to that effect?

"Ans. I may have said it; the chances are that I did."

He denies making the admission to Mr. Bacon, as testified to by Mr. Bacon, (pp. 251, 252.) In short, he does not deny making the admissions to Mrs. Hinton, and in making his denial that Sinton had any interest in the property, he is contradicted by the testimony of Sinton, Ihrie, Bacon and the said conversations with Mrs. Sinton.

In his cross-examination, pages 258 and 259, he admits the payment to him of the $400 by Mr. Fair prior to March 1, 1871. He admits that he gave Mr. Ihrie an account of the expenses that he had been to in respect of this property. He is contradicted in his statements with reference to this transaction not only by the written declaration of trust, but also by the testimony of the witnesses whom we have before alluded to.

Second. He produces the testimony of Mr. T. K. Wilson to prove that this declation of trust was delivered to Wilson *in escrow*, (p. 218,) in which the witness testifies that the two parties, Irvine and Sinton, came to his office with this

paper; that he was in a hurry. "And they said—I think Mr. Irvine—this was to be signed and left with me, to be delivered to Mr. Sinton in case he (Irvine) died upon his passage, or, at least, in case he never returned; if he did return, it was to be returned to him. I made the remark 'that it doesn't make any difference any way what it is.'"

And to that he says that Mr. Sinton did not dissent, which he took for assent. In respect of this interview, in which the witness Wilson says that it was left with him *in escrow*, we have to say, first, that Mr. Wilson himself testifies that the interview was an exceedingly hurried one, and lasted but a very brief time. But a most significant fact in connection with the testimony of this witness is that he himself treated Sinton as one of the owners of this property. (Page 233.) He brought suit in his own interest against Sinton and Irvine, as defendants, on account of fees for services rendered in respect of this very property, and attached this property as the property of Irvine & Sinton. He says, at page 236, question 181:

"As I have stated to you before, Mr. Sinton was apparently from the commencement as deeply interested in the progress of the suits and matters connected with the mine as Mr. Irvine, and I had met with him probably a hundred times in the street and the office, talking in regard to the mine; that was what was referred to."

At page 237 he testifies that he dismissed his attachment suit in order that the corporation could be formed.

We submit that the question in this case is not whether the declaration of trust was delivered in escrow or not, but the question is, *Did the trust exist?* And there can be, as it seems to us, no doubt as to where the preponderance of proof in respect of this matter is. It is incontestibly proven that Sinton and Irvine were operating together in this matter; Sinton was active in regard to it not only as to the procurement of the tax title but in relation to the conveyance and suits which we have before alluded to.

The declaration of trust, even if delivered in escrow, which we deny, is strong and almost irresistible proof in itself that Sinton had then interest and that Irvine held it in trust for him. And when there is added to this the fact not disputed that Irvine received through Sinton the money which has been mentioned; that he repeatedly admitted to witnesses that Sinton had this interest in this property; that he rendered these accounts as to his expenses and disbursements, such proof is not to be overcome by his denials, weakened as they are by his own admissions on cross-examination, and with the addition thereto of the testimony of Mr. Wilson, weakened as it is by the admission that Sinton had perhaps a hundred interviews with him in regard to this property; that the interview between himself, Irvine and Sinton at the time the paper was left with him was an exceedingly hurried one, and the additional but most significant fact that he so far treated this property as being the property of Sinton and Irvine that he brought suit against them jointly for his fees in respect of it, and attached this property as their joint property, and did so Sept. 14, 1874, affidavit (R. p. 304 & 305,) after he professes to have learned, through the delivery of the pages alleged to be in escrow, that Sinton had no interest in the property unless Irvine died on his trip east.

It seems to us that the preponderance of evidence in this case is overwhelming in favor of the existence of such trust, and we here invoke that legal principle that a decree will not be reversed unless the evidence is clear that the court below had erred in respect of it.

There are in this large record other facts and other testimony upon which comment might be made, and which would render the case in favor of the trust much stronger than the view we have here presented. But the parts presented are manifestly ample for the purpose of securing an affirmance of the decree below, and we will, for that reason, not encumber the proof with further comment.

We do not know whether any error will be claimed or not in respect of the accounting made by the master.

If any is made it must be, we apprehend, for the reasons set forth in the Record, p. 80, "exceptions to master's report."

If so, then we have to say that the error alleged in the first specification was corrected, as asked, in the decree, (p. 81.)

As to the other specifications we fail to find anything in the Record to warrant anything that may be claimed different from what is allowed in the decree. There was no evidence introduced as to value of services claimed by appellant, (p. 55.)

Not having had the benefit of any brief for appellant, we will endeavor to answer hereafter (with the permission of the court) whatever may be claimed as error in respect of this accounting, or any other matter connected with the case.

SHELLABARGER & WILSON,
Attorneys.

111-335

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 247.

EMILIE MOULOR, PLAINTIFF IN ERROR,

vs.

THE AMERICAN LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 5, 1881.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES, *Eastern District of Pennsylvania,* } *sct.:*

The President of the United States to the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, Greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between Emilie Moulor, a citizen of the State of Louisiana, plaintiff, and The American Life Insurance Company, a corporation under the laws of Pennsylvania, defendant, in a plea of debt, a manifest error has intervened to the great damage of the said Emilie Moulor, as in her complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme court of the United States, at Philadelphia, this twenty-sixth day of October, A. D. one thousand eight hundred and eighty, and in the one hundred and fifth year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 UNITED STATES OF AMERICA, *ss:*

To The American Life Insurance Company, a corporation under the laws of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Emilie Moulor, a citizen of the State of Louisiana, plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this fourth day of January, in the year of our Lord one thousand eight hundred and eighty-one.

WM. BUTLER, *Judge.*

JAN'Y 14TH, 1881, PHILA.

I accept service of the above citation.

HENRY HAZLEHURST.

3 UNITED STATES, *set:*

The President of the United States to the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between Emilie Moulor, a citizen of the State of Louisiana, plaintiff, and The American Life Insurance Company, a corporation under the laws of Pennsylvania, defendant, in a plea of debt, a manifest error has intervened to the great damage of the said Emilie Moulor, as in her complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the party aforesaid in this behalf. You are hereby commanded that if judgment thereof be given, then under your seal, you do distinctly and openly send the record and process in the suit aforesaid with all things concerning them and this writ; so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourteenth day of November, A. D. one thousand eight hundred and seventy six, and in the one hundred and first year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

Allowed.

W. McKENNAN,
Cir. Judge.

THE UNITED STATES OF AMERICA:

To the American Life Insurance Company, a corporation under the laws of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant of a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Emilie Moulor, a citizen of the State of Louisiana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error as

in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this 25th day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

W. McKENMAN,
Cir. Judge.

Service accepted for defendants in error.
MAY 11, '77. HAZLEHURST.

4 In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit. April Session, 1873.

EMILIE MOULOR, a citizen of the State of Louisiana,
vs.
THE AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of Pennsylvania. } No. 19.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before honorable the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit of April session, 1873, No. 19.

It is thus contained:

Be it remembered that on the twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-three, Emilie Moulor, by her attorney, James Parsons, Esquire, comes into court here and sues forth therefrom a writ of summons against the American Life Insurance Company, which, with the endorsement and return thereto, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *set.:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon The American Life Insurance Company, a corporation under the laws of the State of Pennsylvania, late of your district, if it may be found therein, so that it be and appear before the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court, to be holden at Philadelphia, on the first Monday of June next, to answer to Emilie Moulor, a citizen of the State of Louisiana, in a plea of debt.

And have you then there this writ.

Witness the Honorable Nathan Clifford, associate justice of the Supreme Court of the United States, at Philadelphia, this twentieth day of May, A. D. 1873, and in the ninety-seventh year of the Independence of the United States.

[SEAL U. S. CIRCUIT COURT, E. D. PENNSYLVANIA.] W. GRIER HEBLER,
Pro. Clerk of Circuit Court U. S.

MAY 20, A. D. 1873.

Served the within writ on John S. Wilson, secretary of the within-named American Life Insurance Company, by reading the same in his hearing and leaving a true attested copy thereof with him.

So answers—

JAMES N. KERNS, *U. S. Marshal.*
P'r J. A. GREGORY, *Deputy.*

(Endorsed:) No. 19. Circuit court, April session, 1873. Emilie Moulor *vs.* American Life Insurance Company. Summons. Debt. Returnable on the first Monday of June next. James Parsons, attorney for plaintiff. Filed 2d June, 1873.

And afterwards, to wit, on the third day of June, A. D. 1873, the plaintiff, by her attorney, James Parsons, Esquire, comes into court here and files her narr., which, being read, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania. Of April Sessions, 1873. No. 19.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The American Life Insurance Company, a corporation duly chartered under the laws of the Commonwealth of Pennsylvania, was summoned to answer Emilie Moulor, a citizen of the State of Louisiana of a plea of debt, and thereupon the said plaintiff, by James Parsons, her attorney, complains. For that whereas, heretofore to wit, on the seventeenth day of June, A. D. 1872, at Philadelphia, in the said district, by a certain instrument or policy of insurance, sealed with the common seal of the said corporation, and which said instrument the plaintiff now brings here into court, the date whereof is the same day and year aforesaid, it was witnessed that the American Life Insurance Company in consideration of the representations made to them in the application of the said policy and the payment to them in hand of four hundred and twenty-five $\frac{50}{100}$ dollars, the receipt whereof was thereby acknowledged, and of the further annual premium of four hundred and twenty-five $\frac{50}{100}$ dollars, on the seventeenth day of June in each and every year during the continuance of said policy, did insure the life of Louis Moulor, of New Orleans, in the county of Orleans, State of Louisiana, in the sum of ten thousand dollars, for the term of his natural life.

And that the said corporation did covenant, promise, and agree well and truly to pay or cause to be paid the said sum insured, at their office in the city of Philadelphia, to Emilie, wife of said Louis Moulor, her executors, administrators, and assigns, within sixty days after due notice and satisfactory proof of interest and of the death of the said Louis Moulor; deducting therefrom any indebtedness to the company, and any unpaid balance as the premium of the current year. Provided always, and it was thereby declared to be the true intent and meaning of the said policy, and was accepted by the assured upon these express conditions, that in case the said Louis

Moulor should without the consent of the said corporation, previously obtained in writing, visit those parts of the United States which lie south of 32 degrees of north latitude, between the first of June and the first of November, though it was endorsed on the margin that all restrictions as to travel and residence were removed, or should without the consent of the said corporation, previously obtained in writing, enter into any military or naval service whatsoever, (the militia not in actual service excepted,) or should, without such previous written consent, be personally engaged in blasting, mining, submarine operations, or in the production or transportation of highly inflammable or explosive substances, or in working or managing a steam-engine in any capacity, or as a conductor, brakesman, or hand upon a railroad, or as an officer, hand, or servant of any steam vessel, or in case he should die by his own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium, or other narcotic, or in violation of any law of any of these States, or of the United States, or of any State or country, then the said policy should be void, null, and of no effect, except that in case he should die by his own hand while insane, the amount to be paid by the said corporation on the said policy should be the amount of the premiums actually paid thereon.

And it was thereby declared, covenanted, and agreed that if the representations and answers made to the said corporation in the application for the said policy, upon the full faith and credit of which it was issued, should be found to be untrue in any respect, or that there had been any concealment of facts, then and in such case the said policy should be null and void, or in case the said premiums should not be paid at or before 12 o'clock (noon) on the several days specified and appointed for the payment of the same at the office of the said corporation in the city of Philadelphia, or to agents, when they produce receipts signed by the president or treasurer and with the corporate seal of the said corporation, then, and in every such case, the said corporation should not be liable to the payment of the sum insured, or any part thereof, and the said policy should cease and determine, and all payments made should be forfeited to the said corporation, but after three or more full years' premiums have been paid thereon the said corporation will issue a paid-up policy, payable at death, for about the amount of the premiums paid, provided application were made for the same, and the said policy, while yet in force, should be duly surrendered up to the said corporation.

And it was also covenanted and agreed that the said policy and the insurance thereby effected should be subject to the several conditions and regulations printed on the back thereof, so far as the same could be applicable, in the same manner as if the same respectively were incorporated in the said policy.

And the conditions upon which the said insurance was made, according to the said policy, were as follows, to wit:

1. Policies expire at noon on the last day of the period for which payment has been made.

2. If a change takes place in the name or in the residence of the insured, notice of such change must be given to the company.

3. Agents are not authorized to make contracts for the company nor to write upon the policy (except his signature when necesary to the first receipt of premium; see condition No. 5) nor to waive forfeiture of the same.

4. In case of the assignment of a policy (whether as a security or otherwise,) satisfactory proofs of the amount of the assignee's interest in the insured life must be furnished, with the proofs of death.

5. Receipts for premiums (excepting the first to be found on the face of this policy) will invariably be given on a separate paper, and will not be valid without the seal of the company.

Proofs of loss required:

1. A certificate of the physician who attended the insured in his last illness, stating particularly the nature of the disease, its duration, and the date and hour of decease; his apparent age, height, complexion, and general appearance.

2. Certificate of a friend or intimate acquaintance, stating the disease of which the party died, how long he was sick, a knowledge of such death, and how obtained, and the time of death.

3. Certificate of sexton or undertaker who superintended the funeral of insured and saw his remains interred, stating apparent age, height, complexion, and general appearance.

The said certificates must be sworn or affirmed to before some magistrate or public officer empowered to administer an oath, accompanied by a certificate in conformity to the act of Congress, of the authority of the officer who administers the oath. The necessary receipt on the payment of the policy. When it is a policy on the life of a husband for the benefit of a wife, or the life of a wife for the benefit of a husband, or of a party insuring the life of another, or in case of an assigned policy, a receipt on the policy from the party legally entitled to the payment is all that is required. But when a party insures his own life, in case of death, the insurance must be collected by an executor or administrator legally authorized to settle the estate, and the official certificate of his appointment by the proper tribunal to that effect must be presented at the office of the company, with the policy duly receipted by said executor or administrator.

Acceptance of the premium due on this policy by the company or its agents after the day upon which it is due must be considered as acts of grace or courtesy, and in no wise to be construed as forming a precedent for future payments, or a waiver of the forfeiture of the policy according to the conditions therein expressed; if any future payment of premium be omitted on the day it falls due the company will not be liable for any omission to notify the assured of the time when the premiums fall due. Agents of the company are

in no case authorized to make, alter, or discharge contracts, or waive forfeiture. That the said policy should not be valid until the actual payment of the premium had been made and receipted for at the bottom of the said policy by the treasurer, or by John D. Scott, agent for Louisiana.

In witness thereof, the president of the said American Life Insurance Company, on behalf of the board of trustees, thereunto subscribed his name, George Hill, attested by the secretary, John S. Wilson, and caused the common seal of the said corporation to be affixed at the office in Philadelphia on the seventeenth day of June, 1872, and the receipt of four hundred and twenty-five $\frac{50}{100}$ dollars, the first premium, to be acknowledged by John D. Scott, manager for Louisiana.

And the plaintiff avers that afterwards, to wit, on the third day of January, A. D. 1873, and while the said policy of insurance was in full force and effect, the said Louis Moulor died; that due notice of the death of the said Louis Moulor was given to the defendants within a reasonable time after the happening of the said death, to wit, under the date of January 16, 1873; and that satisfactory proofs of the said death were furnished the said defendants under the same date, in due form of law, and that at the bringing of this suit, more than sixty days nad elapsed since the giving of said due notice, and of furnishing satisfactory proofs to the defendants of the death of the said Louis Moulor, and that the said death was not caused by the doing of any unlawful act within the meaning of the said policy, and that all and singular other the agreements, covenants, stipulations, and conditions of the said policy by the said Louis Moulor, or the plaintiff to have been fulfilled, performed, and complied with, were fulfilled, performed, and fully complied with by the said Louis Moulor before and up to the time of his death, and by the plaintiff since the same occurred, according to the form and effect of the said policy.

And the plaintiff further avers that although the said Louis Moulor, before and up to the time of his death, and the plaintiff since the same occurred, did, and have in all things conformed themselves to, performed, observed, fulfilled, and kept all things in the said policy and conditions and provisions contained on their part to have been conformed to, observed, fulfilled, and kept, according to the form and effect of the said policy, and the agreements, covenants, stipulations, and conditions thereof, as aforesaid.

6 Yet the defendants have not although often requested, paid the said sum of ten thousand dollars, or any part thereof, to the plaintiff; but on the contrary thereof have hitherto wholly neglected and refused, and still do neglect and refuse so to do, and the said sum, together with a further sum of three thousand dollars for interest thereon, is still due and unpaid, whereby an action hath accrued to the plaintiff to have and demand of the defendants the said sums above mentioned.

And whereas said defendants afterwards, to wit, on the nineteenth day of May, A. D. 1873, in the district aforesaid, were indebted to the said plaintiff in the further sum of ten thousand dollars for so much money had and received by the said defendants to and for the use of the plaintiff, and to be paid by the said defendants to the said plaintiff, when the said defendants should be thereunto afterwards requested, which the said plaintiff often hath done, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to have and demand of the defendants the said last-mentioned sum of ten thousand dollars, together with the further sum of three thousand dollars for interest thereupon above demanded, yet the said defendants, although often requested so to do, have not paid the said sums or any part thereof to the said plaintiff, but the said defendants so to do have wholly neglected and refused, and still do refuse.

And whereas the said defendants afterwards, to wit, on the 21st day of April, 1873, in the district aforesaid, accounted with the the said plaintiff of and concerning divers other sums of money before that time then due and owing and in arrear and unpaid from the said defendants to the said plaintiff, and upon that accounting the said defendants were then and there found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars, to be paid by the defendants to the said plaintiff, when they, the said defendants, should be thereunto afterwards requested, whereby and by reason of the last-mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiff to demand and have of and from the defendants the said last-mentioned sum of ten thousand dollars, together with the further sum of three thousand dollars for interest thereupon above demanded, yet the said defendants, although often requested so to do, have not paid the said sums or any part thereof to the said plaintiff, but the said defendants so to do wholly have neglected and refused, and still do refuse, to the damage of the said plaintiff of thirty-nine thousand dollars, and therefore she brings suit.

JAMES PARSONS,
Attorney for Plaintiff.

(Endorsed:) 19. April sess., 1873. U. S. C. C. Moulor *vs.* American Life Insurance Co. Narr.

Please enter rule to plead in 8 days or judgt. sec. reg.

JAMES PARSONS,
Att'y for Pl'ff.

To clerk U. S. C. C.
Filed 3d June, 1873.

JAMES PARSONS.

And afterwards, to wit, on the fifth day of June, A. D. 1873, the defendants, by their attorneys, Henry Hazlehurst, Esquire, and

Isaac Hazlehurst, Esquire, file their pleas, which, being read, is as follows, to wit:

U. S. C. C. April sessions, 1873.

EMILIE MOULOR
vs.
AMERICAN LIFE INS. CO. } No. 19.

Defendant pleads (I) nil debit; (II) payment.

HAZLEHURST,
For Def't.

To the clerk C. C. U. S.
JUNE 5TH, 1873.

(Endorsed:) 19. U. S. C. C. Apr. s., '73. Emilie Mouler *vs.* Amer. Life Ins. Co. Pleas. Filed 5th June, 1873. Hazlehurst, for defts.

And afterwards, to wit, on the 17th day of March, A. D. 1876, the defendants, by their attorneys, come into court here and file special pleas, which, being read, is as follows, to wit:

U. S. C. C. Of April sess., 1873.

MOULOR
vs.
INS. CO. } No. 19.

The defendants, by Isaac Hazlehurst, Esq., their attorney, for an additional plea, plead.

1. Set off.

2. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policy of insurance in said counts mentioned was obtained from the defendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the plaintiff. Wherefore the defendants say that the said policy of insurance is void in law, and this the defendants are ready to verify.

3. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policy of insurance in said counts mentioned was obtained from the defendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants and by the misrepresentations of the assured.

Wherefore the defendants say that the said policy of insurance is void in law, and this the defendants are ready to verify.

(Endorsed:) C. C. U. S. No. 19. Of Apr. s., 1873. Moulor *vs.* Ins. Co. Special pleas. Hazlehurst. Filed March 17, 1876.

7 And afterwards, to wit, on the third day of April, A. D. 1876, a jury being called, come, to wit:

1. Henry Myers.
2. Theodore D. Wheaton.
3. Abraham B. Long.
4. Isaac C. Neale.
5. Martin S. Fry.
6. Jacob T. Kulp.
7. Jacob De Haven.
8. George W. Jones.
9. Augustus R. Hall.
10. Benjamin L. Berry.
11. Phares G. Reinhold.
12. James Baird.

Who are respectively sworn or affirmed to try the issue joined, &c.

And afterwards, to wit, on the fourth day of April, A. D. 1876, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the plaintiff, and assess the damages at eleven thousand nine hundred and fifty dollars, ($11,950), with costs.

And afterwards, to wit, on the fifth day of April, A. D, 1876, the defendants, by their attorneys, come into court here and file reasons for a new trial, which being read, are as follows, to wit:

C. C. U. S. No. 19. Of April, '73.

MOULOR
vs.
AMER. LIFE INS. CO. } No. 19.

Reasons on Behalf of Defendants for a New Trial, &c.

I. The verdict was against the evidence.
II. The verdict was against the weight of the evidence.
III. The verdict was against the charge of the learned court.

HENRY HAZLEHURST,
ISAAC HAZLEHURST,
For Deft's.

(Endorsed:) No. 19. April sess., 1873. U. S. C. C. Moulor *vs.* Ins. Co. Reasons for a new trial. Filed April 5, 1876. Hazlehurst.

And afterwards, to wit, on the 15th day of April, A. D. 1876, before our said judges, come the parties aforesaid, by their attorneys aforesaid, upon which the record and matters aforesaid having been seen and by the court fully understood, and all and singular the premises having been examined, and mature deliberation being had thereon, and for it seems to the court now here that the verdict aforesaid should be set aside, and that a new trial ought to be had of the issues aforesaid, and thereupon a new trial is awarded.

And afterwards, to wit, on the second day of October, A. D. 1876, a jury being called, come, to wit:

1. John C. McCall.
2. Henry Fink.
3. James Raleigh.
4. Frederick A. Halteman.
5. George W. Voight.
6. Joseph M. Watts.
7. Jacob Roth.
8. Abner Rutherford.
9. Thomas Beardwood.
10. William Bovard.
11. Jacob N. Wunder.
12. James G. Osbourn.

Who are respectively sworn or affirmed to try the issue joined, &c.

And afterwards, to wit, on the day and year last mentioned, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the defendant.

And afterwards, to wit, on the 25th day of April, A. D. 1877, the the plaintiff, by her attorney, comes into court here and presents her bond sur writ of error, which being approved, is filed, as follows, to wit:

8 In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania. April session, 1873.

EMELIE MOULOR, a citizen of the State of Louisiana,
vs.
THE AMERICAN LIFE INSURANCE CO., a corporation under the laws of Pennsylvania. } No. 19.

Know all men by these presents that we, Arthur Picolet and Jacob Adler, both of the city of Philadelphia, are firmly bound unto the American Life Insurance Company, a corporation under the laws of Pennsylvania, in the sum of two hundred and fifty dollars lawful money of the United States of America, to which payment well and truly to be made we do bind and oblige ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents, sealed with our seals, dated this 25th day of April, Anno Domini one thousand eight hundred and seventy-seven (1877.)

Whereas in the above-entitled suit a judgment was rendered against the above-named plaintiff, Emilie Moulor, to which judgment a writ of error from the Supreme Court of the United States has been obtained by the said Emilie Moulor, the same being returnable to the second Monday of October, A. D. 1877.

Now, the condition of this obligation is such that if the said Emilie Moulor shall prosecute the said writ of error to effect and answer all damages and costs if she fails to make her plea good, then the above obligation to be void, else to remain in full force and virtue.

A. PICOLET,
416 *South 11th street.*
JACOB ADLER,
909 *Randolph st.*

Sealed and delivered in the presence of—
SAMUEL BELL,
WM. A. WILLIAMSON.

Approved. W. McKENNAN,
Circuit Judge.

(Endorsed:) No. 19. April sess., 1873. C. C. U. S. E. D. of Pa. Moulor *vs.* American Life Insurance Co. Bond sur. Writ of error. Filed April 25, 1877.

Bill of Exceptions.

Be it remembered that at the October sessions, A. D. 1876, came Emilie Moulor, widow of Louis Moulor, late citizen of New Orleans, in the district of Louisiana, into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded the American Life Insurance Company, of Philadelphia, in said eastern district of Pennsylvania, in a certain plea of debt, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city aforesaid, before the honorable William McKennan, circuit judge of said court, on Monday, the second day of October, A. D. 1876, the aforesaid issue between the said parties came to be tried by a jury of said district, for that purpose duly impannelled (prout list of jurors,) at which day came as well as the said plaintiff as the said defendants by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff put in evidence a certain policy of insurance made and executed by the defendants under the hand of their president, attested by their secretary, dated Philadelphia, Pennsylvania, June 17th, 1872, and countersigned by John D. Scott, agent of the defendants for Louisiana, at New Orleans, July, 1872, No. 31916, for $10,000, for the term of the life of Louis Moulor, for the benefit of Mrs. Emilie Moulor (prout the same hereto annexed, marked Exhibit A.) And also the letters of Isaac Hazlehurst, esq'r, of Ap'l 9 & 21, 1873, admitting the fact of Louis Moulor's death; that the proofs of death were furnished in due form of law & within the prescribed period of time (prout the same hereto annexed, marked Exhibits B & C,) and closed.

The defendants then gave in evidence the application signed by Louis Moulor, dated New Orleans, June 17, 1872, upon which said policy was issued (prout the same hereto annexed, marked Exhibit D.) Also the certificates of the two medical examiners of the said Louis Moulor, dated New Orleans, the 18th of June, 1872 (prout the same hereto annexed, marked Exhibit E.)

It was admitted that Louis Moulor died on the 3d of Jan'y, 1873, and that the annual premium was paid as recited in the policy to the defendants in July, 1872.

And also a commission issued by this court to New Orleans, attested July 10, 1873, to New Orleans, and the return made to the same & read the deposition contained therein to the jury.

And also a second deposition issued by this court to New Orleans, attested Feb. 8, 1876, with the return, & read the deposition contained therein of the same deponent, Dr. Jules A. Mathieu, to the jury.

And closed.

Thereupon the pl'ff & def'ts submitted their points to the court & requested the judge to charge the jury upon them (prout the same hereto annexed, marked Exhibit F & G.)

Whereupon he said:

I affirm the defendant's points, and I refuse the pl'ff's points & I instruct the jury to find for the defendants.

EXHIBIT A.

No. 31916. $10,000. Age, 53.

AMERICAN LIFE INSURANCE COMPANY.

Charter perpetual. Incorporated 1850. Philadelphia.

All restrictions as to travel and residence removed.

This policy witnesseth that the American Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the payment to them in hand of four hundred and twenty-five .50 dollars, and of the further annual premium of four hundred and twenty-five .50 dollars, on the seventeenth day of June, in each and every year during the continuance of this policy, do insure the life of Louis Moulor, of New
9 Orleans, in the parish of Orleans, State of Louisiana, in the sum of ten thousand dollars for the term of his natural life.

And the said company do hereby promise and agree well and truly to pay, or cause to be paid, the said sum insured, at their office, in the city of Philadelphia, to Emilie, wife of the said Louis Moulor, her executors, administrators, and assigns, within sixty days after due notice and satisfactory proof of interest and of the death of the said Louis Moulor, deducting therefrom any indebtedness to the company and any unpaid balance on the premium of the premium of the current year. Provided always, and it is hereby declared to be the true intent and meaning of this policy, and it is accepted by the assured upon these express conditions, that in case the said Louis Moulor shall, without the consent of this company previously obtained in writing, visit those parts of the United States which lie south of 32 degrees north latitude, between the first of June and the first of November, or shall, without such previous

written consent, enter into any military or naval service whatsoever (militia not in actual service excepted,) or shall, without such previous written consent, be personally engaged in blasting, mining, submarine operations, or in the production or transportation of highly inflammable or explosive substances, or in working or managing a steam-engine in any capacity, or as a conductor, brakeman, or hand upon a railroad, or as an officer, hand, or servant of any steam vessel, or in case he shall die by his own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium or other narcotic, or in the violatien of any law of any of these States, or of the United States, or of any State or country, then this policy shall be void, null, and of no effect, except that in case he shall die by his own hand while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon.

And it is hereby declared and agreed, that if the representations and answers made to this company, in the application for this policy upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in such case, this policy shall be null and void; or in case the said premiums shall not be paid at or before 12 o'clock (noon) on the several days specified and appointed for the payment of the same, at the office of the company, in the city of Philadelphia, or to agents, when they produce receipts signed by the president or treasurer and with the corporate seal of the company, then, and in every such case, the said company shall not be liable to the payment of the sum issued, or any part thereof, and the policy shall cease and determine, and all payments made shall be forfeited to the company; but after three or more full years' premiums have been paid hereon, the company will issue a paid-up policy payable at death, for about the amount of the premiums paid, provided application is made for the same, and the policy, while yet in force, be duly surrender to the company.

And it is also agreed that this policy, and the insurance hereby effected, shall be subject to the several conditions and regulations printed on the back hereof, so far as the same can be applicable, in the same manner as if the same respectively were incorporated in this policy.

☞No assignment of this policy shall be of any force or effect unless approved by the company, and endorsed thereon by the secretary or other authorized officer, within thirty days from the date thereof; otherwise the premiums shall be considered sunk for the benefit of the company.

This policy shall not be valid until the actual payment of the premium has been made and receipted for at the bottom of this policy by the treasurer, or by John D. Scott, agent for Louisiana.

In witness whereof, the president of the said American Life In-

surance Company, on behalf of the board of trustees, has hereunto subscribed his name, attested by the secretary, and has caused the common seal of said company to be affixed, at the office in Philadelphia, this seventeenth day of June, eighteen hundred and seventy-two.

Attest:

[SEAL OF THE COMPANY.] GEORGE W. HILL,
President.

JOHN I. WILSON,
Secretary.

[U. S. revenue stamp.]

Received, New Orleans, July 1, '72, four hundred and twenty-five 50 dollars, being the first above-named premium. John D. Scott, manager, La.

CONDITIONS.

I. Policies expire at noon on the last day of the period for which payment has been made.

II. If a change takes place in the name or in the residence of the insured, notice of such change must be given to the company.

III. Agents are not authorized to make contracts for the company, nor to write upon the policy (except his signature when necessary to the first receipt of the premium—see condition No. 5), nor to waive forfeiture of the same.

IV. In case of the assignment of a policy (whether as security or otherwise), satisfactory proofs of the amount of the assignee's interest in the insured life must be furnished with the proofs of death.

V. Receipts for premiums, excepting the first (to be found on the face of the policy), will invariably be given on a separate paper, and will not be valid without the seal of the company.

PROOFS OF LOSS REQUIRED.

I. A certificate of the physician who attended the insured in his last illness, stating particularly the nature of the disease, its duration, and the date and hour of the disease; his apparent age, height, and complexion and general appearance.

II. Certificate of a friend or intimate acquaintance, stating the disease of which the party died, how long he was sick, a knowledge of such death, and how obtained, and the time of death.

III. Certificate of sexton or undertaker who superintended the funeral of insured, and saw his remains interred; stating apparent age, height, complexion, and general appearance.

The said several certificates must be sworn or affirmed to before some magistrate or public officer empowered to administer an oath, accompanied by a certificate, in conformity to the act of Congress, of the authority of the officer who administers the oath.

THE NECESSARY RECEIPT ON THE PAYMENT OF THE POLICY.

When it is a policy on the life of a husband for the benefit of a wife, or the life of a wife for the benefit of a husband, or of a party insuring the life of another, or in case of an assigned policy, a receipt on the policy from the party legally entitled to the payment is all that is required. But when a party insures his own life, in case of death the insurance must be collected by an executor or administrator legally authorized to settle the estate, and the official certificate of his appointment by the proper tribunal to that effect must be presented at the office of the company, with the policy, duly receipted by said executor or administrator.

☞Acceptance of the premium due on this policy, by the company or its agents, after the day upon which it is due, must be considered as acts of grace or courtesy, and in no wise to be construed as forming a precedent for future payments or a waiver of the forfeiture of the policy according to the conditions therein expressed if any future payment of premium be omitted on the day it falls due. The company will not be liable for any omission to notify the assured of the time when premiums fall due. Agents of the company are in no case authorized to make, alter, or discharge contracts or waive forfeiture.

No. 31916. Ordinary life policy. Joint stock. American Life Insurance Co., Walnut st., S. E. cor. of Fourth, Philadelphia. Charter perpetual. Insurance on the life of Louis Moulor; amount, $10,000; date of policy, June 17th, 1872; term of life. Payments due on the seventeenth day of June, in each and every year; annual payment, $425.50; United States tax on the policy, $2.00 = $427.50.

Assignment.

For value received hereby transfer and assign unto executors, administrators, and assigns all right, title, and interest in this policy of insurance, and to the payments made therefor, and all benefit and advantage to be derived therefrom.

Witness hand and seal at this day of 187 .

[SEAL.]

Signed and delivered in presence of—

Approved day of 187 .

See't.

EXHIBIT B.

JAMES PARSONS, Esq.

DEAR SIR: I am advised that the "proofs of death" of Louis Moulor furnished to the Amer. Life Ins. Co. under date of Jan. 16, 1873, are in due form of law.

I am, truly y'rs, J'S HAZLEHURST.

APRIL 9, 1873.

EXHIBIT C.

MOULOR *vs.* THE AMER. LIFE INS. CO.

508 WALNUT ST.

JAMES PARSONS, Esq.

DEAR SIR: The sixty days have fully elapsed since the production of the preliminary proofs in this case. The company deny all liability under the policy.

I am, res. y'rs, J'S HAZLEHURST.

APRIL 21, 1873.

EXHIBIT D.

Application for Insurance in the American Life Insurance Co., of Phila.

Statement of particulars respecting the person whose life is proposed for insurance, and which statement forms a part of the contract of insurance:

1. What is the name and residence of the person for whose benefit the insurance is to be effected? Write all the names in full. Name, Emilie Moulor; residence, New Orleans, county of Orleans, State of La.

If a married woman or widow, what was her maiden name? Write Christian name in full. State relationship to the party proposed to be insured.

Married, Emilie Delcroix, wife and children.

2. What is the name, residence, and occupation, or trade of the person whose life is proposed to be insured? Write all names in full. Name, Jean Bernard Moulor dit Louis Moulor. Occupation or trade, merchant; residence, New Orleans, county of Orleans, State of La.

3. Place and date of birth of the person whose life is proposed to be insured? Age next birthday? Place, Genu, France, county of ———, State of ———; date of birth, September 19th, 1819; 53 years.

Are the party's parents living; if so, how old? If not, at what age, and of what disease did they die? State the father's name in full. Father died, aged about 72 years, of old age; mother died, aged about 65 years, of—don't know. Francwa Moulor.

5. Has the party ever been addicted to the use of opium or other stimulants, or been intemperate in the use of alcoholic or other beverages? Are the party's habits now regular and temperate? No; regular and temperate.

6. Has the party been successfully vaccinated? He has.

7. Has the party ever been afflicted with any of the following diseases? Answer yes or no to each. Insanity? No. Gout? No. Rheumatism? No. Palsy? No. Scrofula? No. Convulsions? No. Dropsy? No. Small-pox? No. Yellow fever? Yes.

Fistula? No. Rupture? No. Asthma? No. Spitting of blood? No. Consumption? No. Any diseases of the lungs or throat? No. Or of the heart? No. Or of the urinary organs? No.

8. Has the party experienced any wound, hurt, or other serious bodily injury? No.

9. Is the party now in good health, and does he usually enjoy good health? He does.

10. Has the party's father, mother, brothers, or sisters been afflicted with consumption or any other serious family disease, such as scrofula, insanity, &c., &c. No, not since childhood.

11. How many brothers and sisters of the party are now living, what the ages, and state of health; how many dead, at what ages and of what disease did they die? Sisters living; ages 4; health. Sisters dead; ages 2; disease don't know; died in Europe.

11 12. How long since the party was attended by a physician; for what disease, or diseases? Not since the year 1847, when he had the yellow fever.

13. Give the name and residence of the party's usual medical attendant, and the name and residence of one intimate friend. Dr. Mathew, of New Orleans.

14. Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predispositions, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted? No.

15. Has any agent or company ever declined to insure the party? If so, what company? If now insured, state in what company or companies, and for what amount. No. Is now insured in the following companies, viz: No, no, no, no, no, no.

16. Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed that any untrue or fraudulent answers, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon? Yes.

17. Sum to be insured? (Write words in full.) Ten thousand dollars. Premium payable annually. Table No. 6, premium $425.50.

18. Term for which the insurance is required? Life term.

19. What plan of insurance is desired? Stock plan.

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted

upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.

And it is further agreed that if at any time hereafter the company shall discover that any of said answers or statements are untrue or evasive, or that there has been any concealments of facts, then, and in every such case, the company may refuse to receive further premiums on any policy so granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid.

And it is further declared and agreed that in case the party to be insured shall die by his or her own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium, or other narcotic, or in the violation of any law of any of these States, or of the United States, or of any State or country, then said policy shall be void, null, and of no effect, except that in case he or she shall die by his or her own hand while insane, the amount to be paid by the company on said policy shall be the amount of the premiums actually paid thereon.

And it is further declared and agreed that all and each of the several conditions and regulations of said policy, whether herein enumerated or not, shall be held and considered binding upon the company as well as upon the party or parties hereto.

And it is further declared by the undersigned that the party making this application has an "insurable interest" in the life above proposed for insurance to the full amount applied for.

Dated at this day of , 187 .

Witness

A husband may sign for his wife, thus: "Mary Smith, by John Smith." Where insurance is for the benefit of minor children, it should be signed, "John Smith, as guardian (or trustee) for Mary A., Susan G., and Chas. Smith, my children," or "children of ,"

When the policy is taken in the person's own name, one signature is sufficient. Write Christian names in full. Signature of the person or persons for whose benefit the insurance is to be effected. Signature of the person whose life is proposed to be insured.

Questions to be carefully answered (confidentially) by the family physician.

1. How long have you been acquainted with ?
2. Do you see h frequently? Have you given h medical attendance? If so, for what disease or diseases?
3. Has the party any constitutional infirmity or hereditary predisposition to disease, or is he subject to pulmonary complaints, or any other complaint or disease that tends to shorten life?
4. What is or has been the condition of the party's family as to constitutional vigor, health, &c.?
5. Do you know if he has been and is now regular and temperate his habits?

Dated. (Signature.)

Friend's Certificate.

I certify that I have been personally acquainted with of during the last years, and do believe that his habits of living are temperate, and that he is now in good health, and does ordinarily enjoy good health; and that I know of no constitutional infirmity or other circumstance affecting h calculated to make an insurance on h life more than usually hazardous, except

Dated. (Signature.)

EXHIBIT E.

Questions to be answered by the medical examiner of the American Life Insurance Company of Philadelphia respecting L. Mouler, whose life is proposed for insurance in the sum of $10,000, in an application dated Jan'y 17th, 1872.

A clear and explicit answer is to be given to each of the following questions, and the medical examiner is instructed to ask such other questions bearing upon the case as he may deem proper, and to give any such further information as may be elicited thereby, and to make the examination in all respects thorough, exact, and circumstantial. He should carefully read the accompanying application for insurance before making the examination, and note any points in the same requiring special attention.

(The form of certificate of the personal or family physician
12 of the person examined is to be filled up and presented to the medical examiner, if he considers it requisite.)

The medical examiner should be particularly careful to ascertain whether the answers to the questions in the application from the 5th to the 16th, inclusive, are correctly and understandingly given. If not, they are to be made so before proceeding with the examination. The signature of the person examined is to be attached in the presence of the medical examiner.

1. Description of the person examined. Height, 5 f't. In weight, 145 lbs. Figure. Temperament, sanguine. General appearance, healthy or unhealthy?—healthy. Circumference of chest? Under forced expiration, 34½ inches; under forced inspiration, 36 inches. Other remarks.

2. Is the person examined dumb, or deaf, or blind, (whether partially or wholly, or has he any natural or other infirmity or deformity? No. Lordosis, acquired when 14 years of age.

3. Has he ever resided out of the United States? State where and for what periods. Born in France.

Has he ever resided south of the southerly line of Tennessee? Is he acclimated to such residences, and how? Yes. Had yellow fever in 1847.

4. Are there any indications of disease of the head, external or internal? No.

Are there, or have there ever been indications of any disease of

the brain or nervous system, as by vertigo, affected speech, irregular action of the muscles, or by affection of any kind? No.

Are there, or have there ever been any indications of insanity, or any mental disorder, or any tendency thereto, hereditary or acquired? No.

5. How many inspirations are there in a minute? 17.

Is the respiration full, free, distinct, and perfectly healthy in every part of both lungs? Yes.

Are the respiratory organs free from any suspicion of disease? Yes.

6. Is he free from any tendency to cough, catarrh, vitiated expectoration, spitting of blood, difficulty of breathing, or disease of the throat? Yes.

7. What are the rate, strength, and volume of the pulse? 78. Full. Soft. Regularly.

Is the heart's action uniform, free, and unobstructed? Yes.

Are its sounds and impulses healthy? Yes.

Are the heart and blood-vessels free from any indications of disease? Yes.

Has he now, or has he had any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? If the person has a rupture, he must wear a truss, and so state. No; no.

If a female, is she pregnant? How far gone, and whether first time or otherwise.

9. Has he experienced any severe injury? If so, state what, and its effects upon constitutional health. Lordosis, acquired when 14 years of age, but four years afterwards recovered completely from the consequences thereof.

Has he ever been affected by any severe constitutional disease? If so, state what, and its effects. No.

10. Is there any predisposition, whether hereditary or acquired, to any constitutional disease? If so, state to what disease. No.

11. Do you believe him to be entirely free from any and every disease or disorder whatsoever? Yes.

12. Do you believe him to be strictly temperate and correct in his habits? Yes.

13. Do you consider him in all respects safely insurable? Yes, I do. Do you advise the risk? Yes, I do.

Signature of the person examined to be attached in the presence of the medical examiner.

Date of the above examination at (place) New Orleans, on the 18 day of June, 1872.

(Signed) E. W. THURM, M. D.,
Medical Examiner.

Where graduated, Wurtzburg.
When graduated, 1862. 18 .

Agents are requested to give specific (confidential) answers to every one of these questions, and if they have anything else to state

on forwarding the application, they must communicate it to the office.

1. When did you last see the person whose life is proposed to be insured? Some time since.

2. Are you intimately acquainted with him? If not, have you obtained such information as will enable you to answer the following questions correctly? Have known him well about eight years.

3. Is he in a reputable situation of life, and of temperate habits? He is.

4. Do you consider his occupation or manner of living injurious to his health? No.

5. Do you believe that he is now in good health and has a healthy constitution? Yes; asked Dr. Lewis particularly about case; says he is an excellent risk.

6. Are you aware of any particular circumstance touching his past or present health and habits of life which would make it unsafe to insure his life? By a fall in his youth, but since I have known him has been a very healthy man.

7. Has his family, to your knowledge, been afflicted with pulmonary complaints or any other disease that tends to shorten life? Not as I can learn.

8. Do you consider him in all respects a proper person to be insured, and do you recommend him as such? I do, decidedly.

Dated June 18th, 1872.

JNO. D. SCOTT,
Gen'l Agent.

American Life Insurance Company, Walnut st., s. e. cor. Fourth, Phila.

Policy, No. .
Date of policy, .
Application dated .
Benefit of .
Residence, .
Life of .
Occupation, .
Age nearest birthday, years.
Term of ——.
Sum insured, $.
13 Premium, $
Policy fee and U. S. Tax, $

$

Agent, .
Residence, .

N. B.—The agent is requested not to *to* fill up the above blanks.

Questions to be answered by the medical examiner of the American Life Insurance Company of Philadelphia, respecting Jean Bernard Moulor, or Louis Moulor, whose life is proposed for insurance in the sum of $10,000, in an application dated June 17th, 1872.

A clear and explicit answer is to be given to each of the following questions, and the medical examiner is instructed to ask such other questions bearing upon the case as he may deem proper, and give any such further information as may be elicited thereby, and to make the examination in all respects thorough, exact, and circumstantial. He should carefully read the accompanying application for insurance before making the examination, and note any points in the same requiring special attention.

(The form of certificate of the personal or family physician of the person examined is to be filled up and presented to the medical examiner, if he considers it requisite.)

The medical examiner should be particularly careful to ascertain whether the answers to the questions in the application from the 5th to the 16th inclusive are correctly and understandingly given; if not, they are to be made so before proceeding with the examination. The signature of the person examined is to be attached in the presence of the medical examiner.

1. Description of the person examined: Height? 5 ft. — in.; weight? 145 lbs.; figure? stout; temperament? nervous; general appearance healthy or unhealthy? healthy; circumference of the chest? under forced expiration, 34 inches; under forced inspiration, 36 inches. Other remarks.

2. Is the person examined dumb, or deaf, or blind, (whether partially or wholly,) or has he any natural or other infirmity or deformity? No; has double curvature spine.

3. Has he ever resided out of the United States? State where, and for what periods. Born in France.

Has he ever resided south of the southerly line of Tennessee? Is he acclimated to such residence, and how? Yes; yes; had yellow fever.

4. Are there any indications of disease of the head, external or internal? None.

Are there, or have there ever been, indications of any disease of the brain or nervous system, as by vertigo, affected speech, irregular action of the muscles, or by affections of any kind? No; no.

Are there, or have there ever been, any indications of insanity, or any mental disorder, or any tendency thereto, hereditary or acquired? No; no.

5. How many inspirations are there in a minute? 17.

Is the respiration full, free, distinct, and perfectly healthy in every part of both lungs? It is on the right side with ordinary respiration, and on the left with forced respiration.

Are the respiratory organs free from any suspicion of disease? Yes.

6. Is he free from any tendency to cough, catarrh, vitiated expiration, spitting of blood, difficuly of breathing, or disease of the throat? Yes.

7. What are the rate, strength, and volume of the pulse? 80: full, soft, normal.

Is the heart's action uniform, free, and unobstructed? It is.

Are its sounds and impulses healthy? Yes.

Are the heart and blood-vessels free from any indications of disease? Yes.

8. Has he now, or has he had, any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? If the person has a rupture he must wear a truss, and so state. No; no.

If a female, is she pregnant? How far gone; and whether first time or otherwise?

9. Has he experienced any severe injury? If so, state what, and its effects upon constitution and health. Had a fall at 14 years of age, and was sick four or five years, with double curvature of the spine resulting.

Has he ever been affected by any severe constitutional disease? If so, state what, and its effects. None other than above. Has entirely recovered, and has the appearance of robust health now.

10. Is there any predisposition, whether hereditary or acquired, to any constitutional disease? If so, state to what disease. None.

11. Do you believe him to be entirely free from any and every disease or disorder whatsoever? I do.

12. Do you believe him to be strictly temperate and correct in his habits? I do.

13. Do you consider him, in all respects, safely insurable? I do.

Do you advise the risk? Yes.

L. MOULOR.

Signature of the person examined to be attached in the presence of the medical examiner.

Date the above examination at (place) New Orleans, La., on the 18th day of June, 1872.

(Signed) J. S. LEWIS, M. D.,
Medical Examiner.

Where graduated, .
When graduated, , 18 .

Agents are requested to give specific (confidential) answers to every one of these questions; and if they have anything else to state, on forwarding the application, they must communicate it to the office.

1. When did you last see the person whose life is proposed to be insured? This day.

2. Are you intimately acquainted with him? If not, have you obtained such information as will enable you to answer the following questions correctly? Have known him for 8 years.

3. Is he in a reputable situation of life, and of temperate habits? He is.

4. Do you consider his occupation, or manner of living, injurious to his health? No.

5. Do you believe that he is now in good health, and has a healthy constitution? I do.

6. Are you aware of any particular circumstance touching his past or present health and habits of life which would make it unsafe to insure his life? No.

14 7. Has his family to your knowledge been afflicted with pulmonary complaints, or any other disease that tends to shorten life? Not to my knowledge.

8. Do you consider him in all respects a proper person to be insured, and do you recommend his as such. I do.

Dated June 18th, 1872.

S. A. TUSKIN,
For Agent.

American Life Insurance Company, Walnut street, S. E. cor. Fourth, Philad'a. Policy No. 31916.

Date of policy, June 17th, 1872.
Application, dated " " "
Benefit of Emilie—wife.
Residence, New Orleans, La.
Life of Louis Moulor.
Occupation, merchant.
Age, nearest birthday, 53 years.
Term of life.
Sum insured, $10,000.
An'l premium, $425.50.
Policy, fee, and U. S. tax, 2 .
$
Agent, .
Residence, .

N. B.—The agent is requested not to fill up the above blanks.

EXHIBIT F.

MOULOR *vs.* INS. CO.

Defendants' counsel request the learned court to charge as follows:

1. If the jury believe from the evidence that the answers to the fourth, eleventh, fourteenth, and fifteenth particulars of the seventh question contained in the application were in any respect untrue or evasive or misrepresented or concealed any fact, then the policy is void and their verdict must be for the defendants.

2. If the jury believe from the evidence that the answer to the twelfth question contained in the application was in any respect untrue or evasive or misrepresented or concealed any facts, then the policy is void and the verdict must be for the defendants.

3. If the jury believe from the evidence that there were in the answers to any of the questions contained in the application any untrue or evasive statements or any misrepresentation or concealment of facts, whether the same were material or not to the risk of the insured, then the policy granted upon this application is null and void and their verdict must be for the defendants.

4. If the jury believes from the evidence that the assured

EXHIBIT G.

Plff's Points.

I. If it appears by the evidence that the insured did not know and could not know that he had any disease, his answer that he had none does not preclude a recovery in this policy.

II. If the evidence shows that the insured did not know, and could not know, that he had any disease, the representation contained in the answers, though construed as conditions precedent or warranties, are not untrue in any respect according to the meaning of the policy.

III. The answers to questions 12 & 13 in the application must be taken together & may bear the meaning that the insured had not been attended by a physician for a special disease or diseases since 1847, though he had been attended by a physician for general advice or treatment, by way of preventing rather than curing disease.

IV. The jury are entitled under the evidence to find as a fact, according to the certificates or reports of the def'ts' agents and medical examiners, that Louis Moulor did not have any affection which in ordinary parlance reaches the gravity of a disease.

V. The testimony of Dr. Mathew must be regarded as adverse upon the point of Moulor's health to pl'ff, & if the admissions contained in it can be reconciled with the other evidence they will be interpreted as extorted from a reluctant witness in aid of a consistent theory of the evidence as a whole.

VI. The terms of the policy are not the language of Moulor, but the phraseology of the def't, & if an ambiguity or difference exists in the language, the insured is entitled to take, and the court will give, the interpretation which is most favorable to him.

VII. Unless the fact of Moulor's disease was known to him, or he had the means of knowing its existence, his denial will be construed with reference to his conviction & not to be converted into a warranty against the existence of diseases.

VIII. To make the insured warrant the non-existence of diseases which are inaccessible to his consciousness, the warranty must not be wrapped up in general language, but must be put in a form which will bring home to the insured the plain meaning that he stakes his interest in the policy upon the non-existence of unknown diseases.

IX. The policy sued upon in this case is a contract which was

made to be performed in Pennsylvania, & its construction must be governed by the law of Pennsylvania.

X. If there is any difference in the interpretation of policies of life insurance between the U. S. courts & the courts of Pennsylvania, the distinction taken by the Pennsylvania courts must prevail in the construction of a Pennsylvania contract.

XI. That the question of warranty is not raised under the pleadings in this case, & that the pl'ff is not precluded from recovery unless she or the insured made a statement which was not only untrue in fact, but was also known at the time by her or by the insured to be false, or at least having the means of knowing the statement to be false.

Refused.

And thereupon the counsel for the said pl'ff did then and there except to the aforesaid refusal, charge, and opinion of the said court; and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record, the said counsel for the said pl'ff did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 6th day of October, A. D. 1876.

[L. S.] (Signed) W. McKENNAN.

15 And afterwards, to wit, on the 15th day of Arpil, A. D. 1880, counsel for the respective parties appearing in open court, the following order was made, to wit:

Circuit Court of the United States for Eastern District of Penna., April Sess., 1873. No. 19.

EMILIE MOULOR *vs.* AMERICAN LIFE INSURANCE COMPANY. } S. C., Octo. T., 1879. No. 255.

And now, to wit, this 15th day of April, A. D. 1880, on the motion of Isaac Hazlehurst and Henry Hazlehurst, Esqs., attorneys for the defendants, the American Life Insurance Company, and of James Parsons, Esq., attorney for Emilie Moulor, the plaintiff, the circuit court of the United States for the eastern district of Pennsylvania now enters judgment in the above-entitled case *nunc pro tunc* as of October 6th, A. D. 1876, when judgment upon the verdict rendered October 2d, 1876, should have been entered as a matter of course, and was omitted solely through clerical inadvertence.

(Signed) By the Court.

We, the counsel for the plaintiff and defendants in the
16 above-entitled case, hereby stipulate and agree that judgment

shall be entered *nunc pro tunc* as it should have been entered at the 6th day of October, 1876, when we thought judgment had been entered as a matter of course.

(Signed) JAMES PARSONS, *for Pl'ff.*
" ISAAC HAZLEHURST, *for Def'ts.*

(Endorsed:) No. 19. April sess., 1873. C. C. U. S. E. D. of Pa. Moulor *vs.* American Life Ins. Co. Order for the entry of judgment *nunc pro tunc* as of October 6th, 1876. Entered and filed April 15th, 1880.

And afterwards, to wit, on the 4th day of October, a mandate from the Supreme Court of the United States was received and filed, in the words following, to wit:

17 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pensylvania, Greeting:

Whereas lately in the circuit court of the United States for the eastern district of Pennsylvania, before you, or some of you, in a cause between Emilie Moulor, plaintiff, and The American Life Insurance Company, defendant, wherein the verdict of the jury entered in said cause, on the 2d day of October, A. D. 1876, is in the following words, viz:

" The jurors aforesaid, upon their oaths or affirmations aforesaid, respectfully do say, that they find for the defendant.

The following entry also appears of record, viz:

" And now, to wit, this 15th day of April A. D. 1880, on
18 the motion of Isaac Hazlehurst and Henry Hazlehurst, Esqrs., attorneys for the defendants, The American Life Insurance Company, and of James Parsons, attorney for Emilie Moulor, the plaintiff, the circuit court of the United States for the eastern district of Pennsylvania now enters judgment in the above-entitled case *nunc pro tunc* as of October 6th, 1876, when judgment upon the verdict rendered October 2d, 1876, should have been entered as a matter of course, and was omitted solely through clerical inadvertence. By the court," as by inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-nine, the said cause came on to be heard before the said Supreme Court on the
19 said transcript of record, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said circuit court, in this

cause, be, and the same is hereby, reversed with costs; and that the said plaintiff, Emilie Moulor, recover against the said defendant twenty dollars for her costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a new trial.

10th May, 1880.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice
20 of said Supreme Court, the twenty-first day of June, in the year of our Lord one thousand eight hundred and eighty.

Costs of plaintiff:

Clerk, $ p'd by def't------
Attorney ----------$20 00

$20 00

Taxed by— JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 19. April sess., 1873. No. 255. October term, 1879. Mandate. Supreme Court United States. Moulor *vs.* American Life Insurance Co. Received and filed October 4, 1880.

22 And thereupon it is ordered that a jury come to try the issue joined in this cause.

And afterwards, to wit, on the fourth day of October, A. D. 1880, come the parties aforesaid, and the jurors of the jury aforesaid being called likewise, come to wit:

1. Charles C. Schell,
2. Hamilton W. Cole,
3. Samuel H. Wood,
4. Joseph W. Cassey,
5. Morrow R. Skinner,
6. Roberts Vaux,
7. Walter Leland,
8. Philip Quillman,
9. John Kisterbock,
10. George R. Berrill,
11. Edwin F. Duffield,
12. James Hummel,

who are duly impanneled, returned chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this cause between Emilie Moulor, a citizen of the State of Louisiana, and the American Life Insurance Company, a corporation under the laws of Pennsylvania.

And afterwards, to wit, on the 5th day of October, A. D. 1880, the jurors aforesaid, upon their respective oaths and affirmations aforesaid, do say that upon the issues joined in this cause they find for the defendant.

23 And afterwards, to wit, on the 6th day of October, A. D. 1880, the plaintiff, by her attorney, comes into court here and files reasons for a new trial, which, being read, are as follows, to wit:

U. S. C. C. Ap'l Sessions, '73. No. 19.

MOULOR *vs.* AMERICAN LIFE INS. CO.

Reasons on behalf of Plaintiff for a New Trial.

I. That the verdict was against the evidence.
II. That the verdict was against the weight of the evidence.
III. That the verdict was against the law.

(Signed) JAMES PARSONS,
Att'y pro Pl'ff.

(Endorsed:) 19. April sessions, '73. U. S. C. C. Moulor *vs.* American Life Ins. Co. Reasons for a new trial. James Parsons. Filed October 6, 1880.

24 And afterwards, to wit, on the 9th day of October, A. D. 1880, before our said judges come the parties aforesaid, by their attorneys aforesaid, upon which the record and matters aforesaid having been seen, and by the court fully understood, and all and singular the premises having been examined and mature deliberation being had thereon, and for it seems to the court now here that the verdict aforesaid should not be set aside, and that a new trial ought not to be had of the issues aforesaid: now, therefore, it ordered that a new trial be refused and judgment be entered on the verdict in favor of the defendant and against the plaintiff.

Whereupon judgment is entered on the verdict in favor of the defendant and against the plaintiff accordingly.

25 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania.

EMILIE MOULOR, a Citizen of the State of Louisiana, *vs.* THE AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of Pennsylvania.	No. 19.	April Session, 1873.

Know all men by these presents, that we, Arthur Picolet and Jacob Adler, both of the city of Philadelphia and State of Pennsylvania, are firmly bound unto the American Life Insurance Company, a corporation under the laws of Pennsylvania, in the sum of two hundred and fifty dollars lawful money of the United States of

America, to which payment well and truly to be made we do bind and oblige ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents.

Sealed with our own seals, dated this sixth day of November, anno Domini one thousand eight hundred and eighty.

26 Whereas, in the above-entited suit, a judgment was rendered against the above-named plaintiff, Emilie Moulor, to which judgment a writ of error from the Supreme Court of the United States has been obtained by the said Emilie Moulor, the same being returnable to the second Monday of October, A. D. 1881:

Now the condition of this obligation is such that if the said Emile Moulor shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. PICOLET, [SEAL.]
511 *So. 9th Street, Philad'a.*
JACOB ADLER,
909 *Randolph St., City.*

Sealed and delivered in the presence of—
SAMUEL BELL.
WM. A. WILLIAMSON.

Approved:
WM. McKENNAN, *Cir Judge.*

27 Endorsed: No. 19. April sess., 1873. C. C. U. S., E. D. of Pa. Emilie Moulor *vs.* The American Life Insurance Co. Bond sur writ of error. Filed January 4, 1881.

28 Be it remembered, that at the October sessions, A. D. 1880, came Emilie Moulor, widow of Louis Moulor, late citizen of New Orleans, in the district of Louisiana, into the circuit court of the U. S., for the eastern district of Pennsylvania, and impleaded The American Life Insurance Company of Philadelphia, in the said eastern district of Pennsylvania, in a certain plea of debt, &c., in which the said plaintiff declared (prout narr.) and the said defendants pleaded (prout pleas;) and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city aforesaid, before the Honorable William McKennan, circuit judge, and the Honorable William Butler, district judge of the said court, on Monday, the fourth day of October, A. D. 1880, the aforesaid issue between the said parties came to be tried by a jury of the said district, for that purpose duly impanneled, (prout list of jurors;) at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanneled to try the said issues being also called came, and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff

put in evidence a certain policy of insurance made and executed by defendants under the hand of their president, attested by their secretary, dated Philadelphia, Pennsylvania, June 17th, 1872, and countersigned by John D. Scott, agent of the defendants for Louisiana, at New Orleans, July, 1872, No. 31916, for $10,000, for the term of the life of Louis Moulor, for the benefit of Mrs. Emilie Moulor (prout the same hereto annexed, marked Exhibit "A;") and also the application signed by Louis Moulor, dated New Orleans, June 17th, 1872, upon which said policy was issued, (prout the same hereto annexed, marked Exhibit "D;") and also the certificates of the two medical examiners of the said Louis Moulor, dated New Orleans, June 18th, 1872; and also the reports of the two agents of the defendants, at New Orleans, who effected the insurance (prout the same hereto annexed marked Exhibit "E;") and also the letters of Isaac Hazlehhurst, Esq., of April 9th and
29 21st, 1873, admitting the facts of Louis Moulor's death; that the proofs of death were furnished in due form of law and within the prescribed period of time, (prout the same hereto annexed, marked Exhibits "B" and C,") and closed.

The defendants then gave in evidence the affidavit of Jules A. Mathieu, attached to proofs of death, January 15th, 1873, and also a certificate of the coroner's inquest, January 3d, 1873, and also a commission issued by this court, attested July 10th, 1873, to New Orleans, and the return made to the same, and read the deposition to the jury (prout the same hereto annexed, marked Exhibit "H,") and also a second commission issued by this court to New Orleans, attested February 8th, 1876, with the return, and read the deposition contained therein of the same deponent, Dr. Jules A. Mathieu) to the jury, (prout the same hereto annexed, marked Exhibit "K,") and closed.

Thereupon the plaintiff offered to prove a waiver by the defendants, of a defense under the suicide clause of the policy, and reduced the offer to writing, as follows:

Pl'ff's Offer.

I offer to show by the testimony of Mr. Carson and of Dr. Reese that in a previous trial of this cause, in 1875, the defendants
30 went to the jury upon the issue of an alleged breach of warranty, and no defence was taken upon the insanity of the insured when he committed suicide, although that fact was established by uncontradicted evidence on the part of the plaintiff to show a waiver by the defendants of that lack of a cause of action. Which offer the said court overruled, and excluded the evidence tendered by the plaintiff to prove a waiver.

Whereupon the plaintiff excepted to the decision of the said court in rejecting the evidence of a waiver, and requested the said judges to seal a bill of exceptions, and the said judges did then and there seal this bill of exceptions.

Thereupon the plaintiff submitted points to the court and requested his honor, the judge, to charge the jury upon them, (prout the same hereto annexed, marked Exhibit "L.") Whereupon he said, "the plaintiff's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 20, 21, and 22 cannot be affirmed. No good purpose would be served by stating our reasons or commenting upon them further than to say that we regard each of them as either unsound or irrelevant to the facts of this case."

The 23 reads as follows:

"That the waiver by the defendants of the right to rescind
31 the policy upon the suicide of the insured while insane, is a matter of fact which should be submitted by the court to the jury for determination.

"We answer, certainly the plaintiff might show a waiver by the defendants of any rights of defense it possessed under the policy by submitting proper evidence of the fact; but the court sees no such evidence here."

And thereupon the counsel for the plaintiff did then and there except to the aforesaid answers of the said judge, and requested him to seal a bill of exceptions, and the said judges did then and there seal this bill of exceptions.

Thereupon his honor, Judge Butler, charged the jury, and the plaintiff took exceptions to the following two points contained in the said charge to the jury:

(No. 1.) "It is of no consequence in case he was or ever had been afflicted with either of the diseases named (scrofula, asthma, or consumption;) the policy was thereby rendered void, whether he knew his answer to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend on its being so;" "that he (the insured) did not know he was thus
32 afflicted, is of no importance whatever, except as it may bear upon the question, *Was he so afflicted?* If he *was*, his answer (for the truth of which he bound himself) was untrue, and his knowledge or absence of knowledge on the subject is of no consequence." "You must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer in this respect was untrue, and notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it."

(No. 2.) "Your verdict in this event (suicide by the insured while insane) should be in favor of the plaintiff, for such premiums which as the indorsements in the policy show, amount to $\$425\frac{50}{100}$." "To recapitulate, if you find the policy avoided by means of such untruthful answers, or by means of the act of suicide, (which presupposes that you find the insured *sane* at the time of committing it,) your verdict will be for the defendant, otherwise it must be for the amount of the premiums paid, $425.50."

33 EXHIBIT "H."

Commissions to New Orleans.

In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, of April Session, 1873, No. 19.

EMILIE MOULOR, a Citizen of the State of Louisiana,
vs.
AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of the Commonwealth of Pennsylvania.

The President of the United States to M. Eusebe Bonny, notary public, No. 44 Exchange Place, New Orleans, and the firm of Race, Foster, and E. T. Merrick, attorneys-at-law, corner of Camp street and Commercial Place, New Orleans, Louisiana:

Know ye, that, in confidence of your prudence and integrity, we have given unto you, and by these presents do give unto you, full power and authority, in pursuance of a rule, lately made in the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, in a certain action of debt therein depending, wherein the said Emilie Moulor is plaintiff and the said American Life Insurance Company is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said parties respectively as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation, on certain interrogatories and cross-interrogatories hereunto annexed touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said circuit court, closed up, and under your seals, plainly and distinctly set, together with this writ.

Witness the Honorable Nathan Clifford, Associate Justice of the Supreme Court of the United States, at Philadelphia, the tenth day of July, A. D. 1873, and in the 98th year of the Independence of the said United States.

[SEAL] SAMUEL BELL,
Clerk of Circuit Court.

[Marginal note:] 1873. July 28. Plaintiff names as commissioner: P. Charles Cuvelliier, notary public, No. 140 Gravier St., New Orleans, in place of M. Eusebe Bonny, who is at present sick and unable to attend to the duties of the commission, and his name is therefore substituted accordingly.

Circuit Court of the United States for the Eastern District of Pennsylvania. April Sessions, 1873, No. 19.

EMILIE MOULOR, a Citizen of the State of Louisiana,
vs.
AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of the Commonwealth of Pennsylvania.

And now, to wit, June 24, 1873, James Parsons, attorney for the plaintiff, enters a rule for a commission in the above case to take testimony at New Orleans, in the district of Louisiana, on fifteen days notice.

34 Circuit Court of the United States, for the Eastern District of Pennsylvania. April Sessions, 1873, No. 9.

EMILIE MOULOR, a Citizen of the State of Louisiana,
vs.
AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of the Commonwealth of Pennsylvania.

Interrogatories to be exhibited to witnesses to be produced, sworn, or affirmed, and examined on the part of the plaintiff in the above case, before commissioners to be named in a commission to be issued out of the said court to New Orleans, in the district of Lousiana.

First. What is your age, residence and occupation, and how long have you had your present residence, and how long have you pursued your present occupation?

Second. Were you acquainted with the late Louis Moulor, the husband of Emilie Moulor, the plaintiff in this action?

Third. How long have you been acquainted with the said Louis Moulor?

Fourth. In what place or places did he live, and how long did he live in each place?

Fifth. In what business or businesses was he engaged, and what was the period during which he was engaged in each business?

Sixth. What was the character which he sustained in business?

Seventh. What was the character which he sustained in domestic and social life?

Eighth. What was the result of his business operations?

Ninth. What effect did his business have upon his health and his disposition?

Tenth. What was the immediate cause of his death, and what were the circumstances which attended it?

If in reply to the first interrogatory you shall have answered that you are a medical expert—

Eleventh. What was the state of his health and his physical condition at the time of his death?

Twelfth. If he killed himself, what was his mental and moral condition previous to and at the time of the act of self-destruction?

Thirteenth. Was he, or was he not, able to distinguish between

right and wrong, and to appreciate the nature and quality of the act he was doing?

Fourteenth. Was he, or was he not, capable of forming a rational judgment about the act he was doing?

Fifteenth. Do you know anything else which may be material or of use to the plaintiff? If aye, state the same fully, minutely, and at large, as if you had been particularly interrogated in relation thereto.

JAMES PARSONS,
Att'y for Plaintiff.

The plaintiff names as commissioner on their behalf, M. Eusebe Bonny, notary public, No. 44 Exchange Place, New Orleans.

U. S. C. C. April Sess., 1873. No. 19.

EMILE MOULOR *vs.* AMERICAN LIFE INS. CO.

Interrogatories to be exhibited by way of cross-examination to and answered by witnesses to be produced, sworn or affirmed, and examined on the part of the plaintiff by the above-named commissioner:

35 First cross-interrogatory. Have you any interest of any kind in the suit, or contingent upon the result of it?

Second cross-interrogatory. Were you connected by birth or marriage, or in any way with the deceased, or are you with the plaintiff?

Third cross-interrogatory. Were you a member of his family, and did you become acquainted with his domestic and social life; was it by personal interview or by correspondence? If the latter, annex the same to your answer.

Fourth cross-interrogatory. What was his business when first established; what was the amount of his capital; who were his clerks? Furnish a copy of his profit and loss account from the time he first went into business until his death.

Fifth cross-interrogatory. Were you present at his death; how did it occur; had you attended him before his death; how long and for what disease; when did you first visit him, and for what cause?

Sixth cross-interrogatory. If, in answering the plaintiff's thirteenth (13th) interrogatory in chief, you say that the plaintiff was not able to distinguish right and wrong, or to appreciate the nature and quality of the act he was doing, please state minutely and particularly the grounds of your opinion, and the particular symptoms of the disease.

The defendants name as their commissioner the firm of Race Foster and E. T. Merrick, attorneys-at-law, corner of Camp street and Commercial Place, New Orleans, La.

HAZLEHURST,
For Def'ts.

Depositions of witnesses produced, sworn, and examined on the ninth (9) day of October, in the year of our Lord one thousand eight

hundred and seventy-three, at the office of P. Charles Cuvellier, notary public, No. 140 Gravier street, in the city of New Orleans, in the State of Louisiana, by virtue of a commission issuing from the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, to P. Charles Cuvellier, notary public, No. 140 Gravier street, New Orleans, and the firm of Race Foster & E. T. Merrick, attorneys-at-law, corner of Camp street and Commercial Place, New Orleans, Louisiana, directed for the examination of witnesses in a certain cause depending in said court, wherein Emilie Moulor, a citizen of the State of Louisiana, is plaintiff, and the American Life Insurance Company, a corporation under the laws of the Commonwealth of Pennsylvania, is defendant.

Jules A. Mathieu, of the city of New Orleans, aged forty-eight years, or thereabouts, being produced, sworn, and examined on behalf of the plaintiff, deposeth as follows:

To the first interrogatory on the part of the plaintiff he answers as follows:

My age is forty-eight years; my residence New Orleans, and my occupation that of a physician; I have resided in New Orleans since the year 1837, and have pursued my occupation since the year 1854.

2. To the second interrogatory on the part of the plaintiff he answers as follows:

I was.

3. To the third interrogatory on the part of the plaintiff he answers as follows:

Ever since the year 1855.

4. To the fourth interrogatory on the part of the plaintiff he answers as follows:

36 Since I have known him he resided in New Orleans, except his taking two trips to Europe, each of a few months, and on business.

5. To the fifth interrogatory on the part of the plaintiff he answers as follows:

When I first knew him him he kept a leather store in Chartres street. In the latter part of 1858, or the beginning of 1859, he opened a tobacco store in partnership with Mr. Fleury. His connection with Mr. Fleury ceased in 1865, and in that same year he went into partnership in the same business with Mr. Fidel, and that partnership ceased to exist in 1866; he all that time continuing to keep his leather establishment. In the leather business, in 1861, he took into partnership Mr. Dumestre, and this association ceased on the 1st of May, 1872, by contract, but in fact only on the 23d of that same month; from said month of May, 1872, Moulor was no longer in the leather business. In the year 1869 he had bought a plantation in the parish of St. James; a sugar plantation, which was sold to Mr. J. Trotot about a week before the death of Moulor. At the time of his death he was engaged only in the tobacco business, keeping a store at the corner of Old Levee and Bienville streets, and a factory in the third district of New Orleans.

6. To the sixth interrogatory on the part of the plaintiff he answers as follows:

Up to the time of his death he sustained a very good character—that of a very honorable man.

7. To the seventh interrogatory on the part of the plaintiff he answers as follows:

A very good character; a good husband, a good father, always ready to assist his friends in need, and very charitable generally; he was of very sober habits.

8. To the eighth interrogatory on the part of the plaintiff he answers as follows:

His business was thriving as long as it was limited to the leather store; with the tobacco store he discovered, in 1865, great losses, which his partner, Mr. Fleury, could not account for, and that was the occasion of a law suit by him against Fleury; the same was the case with Fleury's successor, Mr. Fidel. Great losses occurring, which Fidel could not account for, and that gave rise to another suit against Fidel; then again his sugar plantation, for the management of which he had taken Mr. Carete as a partner, was a constant source of unceasing expenses, and during the four years that he owned the plantation not a single good crop was realized.

9. To the ninth interrogatory on the part of the plaintiff he answers as follows:

It had a very depressing effect on his mind, and more and more so as he realized he was sinking. Once, in the latter part of December, 1872, he exhibited to me in several instances that he was gradually losing moral judgment; from the 31st of December, 1872, to January, 1873, during the night he woke up, complaining of a most intense pain in his head. I was sent for, and in the morning he said he had felt as if he had been losing his mind in that night, but it vanished in the morning.

10. To the tenth interrogatory on the part of the plaintiff he answers as follows:

On the 3d of January, 1873, at 10 o'clock in the morning, he was seated in a horse car, which plies from the terminus of the Esplanade street line to the terminus of the Canal
37 street line running on the Metanie ridge road; he was at the Bayou St. John end of the road, alone in the car, not even the driver being present, (the driver was in a bar-room across the road), when suddenly the report of two pistol shots was heard; the smoke in the car caused the driver to come back to it, when he found, together with some few persons who had followed him, the body of Mr. Moulor lying on his face on the floor of the car, and a pistol a few inches from his right hand; he was then dead. The above facts I state as having been elicited at the inquest. His corpse was brought to his home, where I saw it. I examined it, and in my judgment the death had taken place from the effect of two pistol shot wounds, one ball entering the mouth, passing through the brain, had made its exit on the right side of the head; the other

ball had entered the inner side of the right eye, just below the eye brow; that ball also passing through the brain. Either of the wounds would have been sufficient to destroy life.

11. To the eleventh interrogatory on the part of the plaintiff, he answers as follows:

Ordinary. Nothing abnormal had taken place in his physical condition, except the pains suffered by him in the head, as stated before, in the night from Dec. 31, 1872, to Jan'y 1, 1873.

12. To the twelfth interrogatory on the part of the plaintiff, he answers as follows:

He had pretty much lost the faculty of moral judgment, in fact he could not form a correct judgment; he would at times begin sentences and then find himself in the impossibility of finishing them, losing sight entirely of the subject of his thoughts, which would make him very nervous; these aberrations were the more striking in his case, because, naturally, he was of a very cold, sedate turn of mind, always exempt from any enthusiasm or excitement whatever.

13. To the thirteenth interrogatory on the part of the plaintiff, he answers as follows:

I should think not.

14. To the fourteenth interrogatory on the part of the plaintiff, he answers as follows:

Again, I should think not.

15. To the fifteenth interrogatory on the part of the plaintiff, he answers as follows:

Nothing further than what I have before stated.

X.

X 1. To the first cross-interrogatory on the part of the defendant, he answers as follows:

None whatever, neither directly or indirectly.

X 2. To the second cross-interrogatory on the part of the defendant, he answers as follows:

Neither with the plaintiff nor with the deceased in any manner or to any degree whatever.

X 3. To the third cross-interrogatory on the part of the defendant, he answers as follows:

I was acquainted with him since the year 1855, as his physician.

I was acquainted with his wife, her mother, and her father,
38 as their family physician since 1855; besides visits as a physician, I made social calls, but was not a member of the family.

X 4. To the fourth cross-interrogatory on the part of the defendant, he answers as follows:

As I have stated before, when I first knew him he was in the leather business, then went into the tobacco business concurrently with the other, then purchased a sugar plantation, which he sold shortly before his death, and at his death was solely engaged in the

under the laws of Pennsylvania, is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said plaintiff as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation, on certain interrogatories hereunto annexed touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said circuit court closed up, and under your seals, plainly and distinctly set, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this eighth day of February, A. D. 1876, and in the 100th year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk of Circuit Court.

Circuit Court of the United States, for the Eastern District of Pennsylvania. April Sessions, 1873, No. 19.

EMILIE MOULOR, a Citizen of the State of Louisiana,
vs.
AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of the Commonwealth of Pennsylvania.

And now, to wit, January 15, 1876, James Parsons, attorney for the plaintiff, enters a rule for a commission in the above
41 case, to take testimony at New Orleans, in the district of Louisiana, on fifteen days' notice.

Interrogatories to be exhibited to witness to be produced, sworn or affirmed, and examined, on the part of the plaintiff in the above case, before commissioners to be named in a commission to be issued out of the said court, to New Orleans, in the district of Louisiana:

First. What is your age, residence, and occupation, and how long have you had your present residence, and how long have you pursued your present occupation?

Second. Were you acquainted with the late Louis Moulor, the husband of Emilie Moulor, the plaintiff in this action; if so, how long have you been acquainted with him?

Third. If he killed himself, state if you know the immediate cause of his death, and the circumstances attending it.

If you were the family physician of said Louis Moulor—

Fourth. Explain in detail the nature and extent of any disease, which did, or might have affected or impaired, according to your judgment, his general or permanent health.

Fifth. If you have referred to any disease which affected the said Moulor, in general terms, be explicit and define with accuracy the character and modifications of them in the particular instances of the subject, Louis Moulor.

Sixth. Do you know anything which may be material or of use to the plaintiff; if aye, state the same fully, minutely and at large, as if you had been particularly interrogated in relation thereto.

JAMES PARSONS,
Jan'y 15th, 1876. *Attorney for Pl'ff.*

The plaintiff names as commissioner on her behalf, John G. Eustis, Esquire, attorney-at-law, No. 35 Carondelet street, New Orleans, Louisiana.

Deposition of witness produced, sworn and examined on the twenty-third day of February, in the year of our Lord 1876, at the office of John G. Eustis, No. 35 Carondelet street, in the city of New Orleans, within the parish of Orleans, and State of Louisiana, by virtue of a commission issuing from the circuit court of the United States for the eastern district of Pennsylvania, to him directed, for the examination of a witness in a certain cause depending in said court, wherein Emilie Moulor is plaintiff, and The American Life Insurance Co. is defendant.

JULIUS A. MATHIEU, of the city of New Orleans, aged 51 years, or thereabouts, being produced. sworn, and examined on behalf of the plaintiff, deposeth as follows, in answer to the several interrogatories on the part of the plaintiff:

1st. To the 1st int. he saith:

I am 51 years of age; reside in New Orleans; my profession is that of a physician; I have resided in this city for the past 39 years, and have practiced my present profession for the past 21 years.

2d. To his 2d int. he saith:

I knew him, and have known him since 1854.

3d. To the 3d int. he saith:

He committed suicide, as was established by the coroner's inquest; I only saw his dead body when it was brought back to his residence; I was his family physician, and have been since 1855.

4th. To the 4th int. he saith:

As to his general constitution, I will state that he was delicate; I treated him for scrofula, for the first symptoms of consumption, and for asthma, but he never learned from me, nor from any
42 other physician in this city, nor did he suspicion or have the remotest idea that he was affected with any such diseases himself; on the contrary, he always boasted and prided himself as being a strong, healthy, and robust man.

5th. To the 5th int. he saith:

The asthma he had was the dry nervous asthma; no expectoration whatever, and nothing connected therewith to make the patient believe he did have it. As to the first stage of consumption, there was no softening of the tubercles, and therefore no expectoration of tuberculous matter. As to the scrofula, I will state that his was very mild diathesis.

6th. To the 6th int. he saith:

I did not impart to said Moulor a knowledge that he was affected with any of said three before-mentioned diseases, out of a feeling of humanity, a rule I never deviate from in my practice whenever the mind of the patient might be affected thereby. The Company, defendant, was aware at the time they accepted Mr. Moulor that I was his family physician, and his, and had I been applied to for information as to his general health and constitution, or requested to fill out one of the usual blanks of examination by a physician, I certainly would have stated and made known that he had been affected with the diseases I have before mentioned. I have never been absent from nor ceased practicing my profession in this city since 1854. My name was furnished Company, defendant, by Mr. Moulor, in writing, as his physician, thus enabling the company to get all desirable information from the proper source, which information thought proper neglecting to procure. I never knew he was insured until after his death.

JULES A. MATHIEU, *M. D.*

Sworn to and subscribed before me, this 23d day of February, A. D. 1876.

[SEAL.] J. G. EUSTIS,
U. S. Commissioner, Dist. of Louisiana.

DISTRICT OF LOUISIANA,
Parish of Orleans, City of New Oleans, } *ss:*

I, John G. Eustis, at the city of New Orleans, parish of Orleans, and State of Louisiana, do hereby certify that the said witness, Julius A. Mathieu, prior to the taking of said deposition, on the twenty-third day of February, A. D. 1876, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in relation to the matter in controversy in the suit before mentioned, in the caption to this deposition, and in the inclosed commission, so far as he might be interrogated in relation thereto; and the said deposition was, on the twenty-third day of February, A. D. 1876, in the city of New Orleans, and parish of Orleans, in the State of Louisiana, sworn to, taken and reduced to writing by my clerk, and signed by said witness in my presence.

I further testify that I am not, nor is my said clerk, of counsel, kin, nor attorney to either party to this suit, nor interested in the event thereof.

Given under my hand and official seal, at said city of New Orleans, this twenty-third day of February, A. D. 1876.

[SEAL.] J. G. EUSTIS,
United States Commissioner, District of Louisiana.

Commissioner's charges, postage, &c., $5.25, paid by plaintiff.

[SEAL.] J. G. EUSTIS,
Commissioner, &c.

Deposition on part of the pl'ff opened in open court, and filed M'ch 3, 1876.

SAMUEL BELL, *Clerk.*

43 EXHIBIT L.

Plaintiff's Points.

1. That the decision of the Supreme Court reversing the judgment of this court is *res adjudicata* upon all points which might have been raised, by way of defense, under the pleadings in this case, and leaves open, at this trial, only the breach of the requirement, in the policy, of truthfulness, by the insured.

2. That the issue taken by the defendants under the pleadings, on the previous trials, being the construction of the requirement, made by the policy, of truth on the part of the insured in his application, they cannot raise a different issue on this trial, but are limited to the original defense of a breach of the warranty of truthfulness.

3. That the contention of the defendants that they did not insure against insane suicide, admits that the insanity of the insured is not the defense to a cause of action, but a preliminary abatement of the action; the fact of insanity establishing the non-existence of a contract, while the right of action depends upon the existence of a contract.

44 4. That the defendants cannot contradict the evidence produced, and not contradicted by them at previous trials, of the insured's insanity.

5. That the evidence produced by the defendants at the previous trials, of the insured's insanity, when he committed suicide, and not contradicted, is to be accepted as proof of the fact, and if not acted upon by the defendants by returning the premium and availing themselves of the right to annul *ab initio* the contract of insurance, in order to escape liability under the policy, precludes them from raising the defense of the insured's insanity when he committed suicide, after they had abandoned such a defense, on the previous trials before the jury.

6. That the denial by the defendants of any contract is precluded by the defense of its breach.

7. That the judgments, *pro* and *con*, on the issue of a breach by the insured of the contract of insurance, settled by necessary consequence the preliminary fact of the contract's existence.

45 8. That the defendants were bound, if they elected to treat the contract of insurance as "off," on account of the insured's insanity when he committed suicide, to return the premium, and their failure for a period of at least four years to make the retender, is an abandonment of the right.

9. If it appears by the evidence that the insured did not know, and could not know, that he had any disease, his answer that he had none does not preclude a recovery on this policy.

10. If the evidence shows that the insured did not know, and

could not know, that he had any disease, the representations contained in the answers, though construed as conditions precedent or warranties, are untrue in any respect, according to the meaning of the policy.

11. The answers to questions 12 and 13 in the application must be taken together, and *may* bear the meaning that the insured had not been attended by a physician for a specific disease or diseases since 1847, though he had been attended during the time by
46 a physician for general advice or treatment, by way of preventing rather than curing disease.

12. The jury are entitled, under the evidence, to find as a fact, according to the certificates or reports of the defendant's agents and medical examiners, that Louis Moulor did not have any affection which in ordinary parlance reaches the gravity of a disease.

13. The testimony of Dr. Mathieu must be regarded as adverse upon the point of Moulor's health to plaintiff, and if the admissions contained in it can be reconciled with the other evidence, they will be interpreted as extorted from a reluctant witness in aid of a consistent theory of the evidence as a whole.

14. The terms of the policy are not the language of Moulor, but the phraseology of the defendant, and if an ambiguity or difference of meaning exists in its language, the insured is entitled to take, and the court will give the interpretation which is most favorable to him.

47 15. Unless the fact of Moulor's disease was known to him, or he had the means of knowing its existence, his denial will be construed with reference to his conviction, and not be converted into a warranty against the existence of disease.

16. To make the insured warrant the non-existence of diseases which are inaccessible to his consciousness, the warranty must not be wrapped up in general language, but must be put in a form which will bring home to the insured the plain meaning that he stakes his interest in the policy upon the non-existence of unknown diseases.

17. The policy sued upon in this case is a contract which was made to be performed in Pennsylvania, and its construction must be governed by the law of Pennsylvania.

18. If there is any difference in the interpretation of policies of life insurance between the U. S. courts and the courts of Pennsylvania the distinction taken by the Pennsylvania courts must prevail in the construction of a Pennsylvania contract.

48 19. That if Moulor did not possess the ability to distinguish between right and wrong, and to appreciate the nature and quality of the act of self-destruction when he committed it, the def't is liable.

20. That the exception which purports to rescind the policy by a return of the premiums, in the event of Moulor's suicide while insane, is a condition subsequent, and as such is void, because it

could take effect only upon an act by Moulor which he could not perform.

21. That the def'ts not having made a tender or return of the premium are precluded from setting up as a defense a payment of the sum due under the policy, and are liable for the full sum insured, $10,000, with interest.

22. That the defendants, not having made a tender or return of the premium, are precluded from setting up as a defense to a payment in full a privilege of rescission of which they have not availed themselves.

23. That the waiver by the def'ts of the right to rescind the policy upon the suicide of the insured while insane is a matter of fact which should be submitted by the court to the jury for determination.

49 And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for said —— did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the plaintiff, did put their seals to this bill of exceptions pursuant to the aforesaid statute in such case made and provided, this eleventh day of October, A. D. 1880.

(Signed) W. McKENNAN, [L. S.]
Cir. Judge.

" WM. BUTLER, [L. S.]
Judge.

50 *Docket Entries.*

April Session, 1873.

JAMES PARSONS.			EMILIE MOULOR, a Citizen of the State of Louisiana, *vs.* THE AMERICAN LIFE INSURANCE COMPANY, a Corporation under the Laws of Pennsylvania.	Summons Debt.
19.				
H. & I. HAZLEHURST.				
1873.	May	20.	Præcipe filed. Summons debt isssued, returnable on the first Monday of June next.	
"	"	22.	Henry Hazlehurst and Isaac Hazlehurst, Esqs., appear for the defendants.	
"	June	2.	Summons returned served.	
"	"	3.	Narr. filed. Rule to plead in 8 days or judgment *see. reg.*	
"	"	5.	Defendants plead: Nil debit and payment.	

1873.	June	23.	Rule for a commission on 15 days' notice to New Orleans.
"	"	23.	Interrogatories in chief filed.
"	July	9.	Cross-interrogatories filed.
"	"	10.	Commission to New Orleans, La., exit.
"	"	28.	Plaintiff files nomination of another commissioner on her behalf, under the commission to New Orleans, La.
"	Oct.	15.	Commission to New Orleans received and opened in open court.
1874.	March	24.	Struck jury list filed by the plaintiff.
"	April	16.	And now, to wit, this 16th day of April, A. D. 1874, a jury being called, come, to wit: [See Minutes.]
"	"	16.	A juror is withdrawn and case continued at costs of plaintiff for the term.
1876.	Jan.	15.	Rule for commission to New Orleans and interrogatories filed.
"	Feb.	8.	Commission to New Orleans issued.
"	March	3.	Commission to New Orleans opened in open court and filed.
"	"	17.	Special pleas filed by defendant.
"	April	3.	And now, to wit, this April 3d, A. D. 1876, a jury being called, come, to wit: [See Minutes.]
"	"	4.	And, to wit, this April 4th, A. D. 1876, the jurors aforesaid, on their oaths and affirmations aforesaid, respectfully do say, that they find for the plaintiff, and assess the damages at eleven thousand nine hundred and fifty dollars, with costs.
"	"	5.	Reasons for a new trial filed.
51			
"	"	15.	Verdict set aside and new trial granted (folio 513.)
"	Oct.	2.	And now, to wit, this 2d day of October, A. D. 1876, a jury being called, come, to wit: [See Minutes.]
"	"	2.	And now, to wit, this 2d day of October, A. D. 1876, the jurors, upon their oaths or affirmations aforesaid, respectively do say, that they find for the defendant.
"	Nov'r	14.	Præcipe for writ of error filed.
"	"	14.	Writ of error issued, and copy thereof lodged for the adverse party in the clerk's office.
1877.	April	25.	Bond *sur* writ of error approved and filed.
"	"	25.	Citation issued.

1877.	May	11.	Citation returned service accepted for defendant by Henry Hazlehurst, Esquire.
"	"	11.	Bill of exceptions filed.
"	"	11.	Clerk's costs paid.
"	Oct'r	8.	Record and writ of error transmitted to the clerk of the Supreme Court of the United States.
1880.	April	15.	Order for the entry of judgment *nunc pro tunc* as of October 6th, 1876. (See order on file and in Minutes.)
"	Sept.	21.	Struck jury list filed by defendant.
"	Oct.	4.	Mandate of the Supreme Court of the United States, received and filed, ordering that the judgment of the circuit court be, and the same is hereby, reversed with costs, and the same is remanded with directions to award a new trial.
"	"	4.	And now, to wit, a jury being called, come, to wit: [See Minutes.]
"	"	5.	And the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say, that they find for the defendant.
"	"	6.	Reasons for new trial filed.
"	"	9.	Argued on motion for a new trial.
"	"	9.	Motion for a new trial refused, and judgment on the verdict.
"	"	11.	Bill of exceptions filed.
"	"	26.	Præcipe for a writ of error filed, writ of error issued, and a copy thereof lodged for the adverse party in the clerk's office.
1881.	Jan.	4.	Citation issued, and bond *sur* writ of error filed.
"	"	14.	Citation returned, service accepted by Henry Hazlehurst, Esq.

52 *Letters.*

MOULOR
vs.
AM. LIFE INS. CO. } S. C. U. S. No. 255.

32 So. 3D ST., PHILAD'A, *Oct.* 28, 1879.

Messrs. HENRY HAZLEHURST and ISAAC HAZLEHURST.

MY DEAR SIRS: In taking up the record of this case, in order to prepare a paper book, I find some defects which must be rectified before we can argue the case on error.

First. The writ of error refers to both commissions, (see page 10,) which were issued to N. O., but does not introduce them by a *prout*, and hence they were not printed as a part of the record.

This was possibly my fault; but it is explained by my absence from town in the summer of 1878, when the summons came from Washington to make up and remit the record. I left the matter, I thought, in competent hands, but they made a mess of it. The record is full of misprints and blunders.

Second. The docket entries are not certified as they appear on the C. C. Docket, but different items are ticked off and sent up by the clerk according to his idea of the case. We are interested in having the docket as it stands before the Supreme Court.

What I ask of you, therefore, is that I should print the commissions, on which both our arguments turn, in my paper book, with the same effect as if they were on the record itself, and should also print a correct copy of the docket entries.

Very truly yours, JAMES PARSONS,
Att'y for Pl'ff.

MOULOR
vs.
LIFE INS. CO. } U. S. Supreme Court. No. 255.

JAMES PARSONS, Esq., *Pl'ff's Attorney.*

DEAR SIR: We are in receipt of your letter of Oct. 28th, and are entirely willing to comply with its request.

Very truly yours, HENRY HAZLEHURST.

NOVEMBER FOURTH, 1879.

MOULOR
vs.
AM. LIFE INS. } U. S. S. C. Record, No. 255.

32 So. 3D ST., PHIL'A, *Dec.* 24, 1879.

Messrs. ISAAC & HENRY HAZLEHURST.

DEAR SIRS: I went to the court office yesterday to consult
53 the "Minutes," which are referred to in the docket entries, for particulars of the trial, and found no mention of the fact that we submitted the case upon the evidence at the former trial without any change. As I have put this fact in my "statement of the case," but do not wish to assert anything you might wish to deny which is not on the record, I ask you to confirm my statement, if you have no objection.

I am busy at my paper book, and hope to furnish you a copy very soon.

Yours truly, JAMES PARSONS.

MOULOR
vs.
INS. CO. } U. S. S. C. Record, No. 255.

To Mr. JAMES PARSONS.

DEAR SIR: We cannot comply with the request contained in your

note of Dec. 24th. We beg to be furnished at your earliest convenience with your brief, as the case is far upon the list.

Very truly, etc., HENRY HAZLEHURST.
ISAAC HAZLEHURST.

(No date, but post-marked Dec. 26, 1879)

MOULOR *vs.* AM. LIFE. } S. C. U. S. Record, No. 255.

32 So. 3D ST., PHIL'A, *Dec.* 27, '79.

Messrs. I. & H. HAZLEHURST.

DEAR SIRS: As you do not feel at liberty to volunteer the acknowledgment that we submitted the case upon the evidence of the former trial, and as that fact ought to appear upon the record, I notify you hereby that I rely, and upon the argument, and shall insist upon that fact, which is undeniable.

I am rushing through with my paper book, and you shall have it as soon as it can be prepared.

Very truly yours, JAMES PARSONS.

54 MOULOR *vs.* INSURANCE CO. } U. S. C. C. April Sessions, 1873. No. 19.

It is agreed that the record in the above-entitled case shall be filed as corrected and amended.

JAMES PARSONS,
Of Counsel for Plaintiff in Error.
HENRY HAZLEHURST,
Of Counsel for Defendants in Error.

PHILADELPHIA, *March 18th*, 1881.

Endorsed: 19. Ap'r sess., C. C., 1873. Moulor *vs.* Ins. Co. Agreement of counsel. Henry Hazlehurst.

55 UNITED STATES OF AMERICA, *Eastern District of Pennsylvania*, } *set.:*

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings as corrected and amended by stipulation in the case of Moulor *vs.* American Life Insurance Company, No. 19, April sess., 1873, on file, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Philadelphia, this eighteenth day of March, in the year of our Lord one thousand eight hundred and

eighty-one, and of the Independence of these United States the one hundred and fifth.

[SEAL.]

JAMES BELL,
Clerk of C. C.

Endorsed on cover: E. Penn'a C. C. U. S. No. 247. Emilie Moulor, plaintiffs in error, *vs.* The American Life Insurance Company. Filed 5th May, 1881.

111-335

FILED
FEB 13 1884

No. 247. October Term, 1883

Supreme Court of the United States.

EMILIE MOULOR

vs.

AM. LIFE INS. COMPANY.

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 247, of October Term, 1883.

EMILIE MOULOR, Plaintiff below and Plaintiff in error,

vs.

AM. LIFE INS. COMPANY, Defendant in error and Defendant below.

BRIEF FOR PLAINTIFF IN ERROR.

I.—STATEMENT OF THE CASE.

Action of Debt upon a policy of life insurance under seal, originally brought in the United States Circuit Court for the Eastern District of Pennsylvania by the plaintiff, a citizen of the State of Louisiana, against the defendant, a corporation and a citizen of the State of Pennsylvania.

The policy, No. 31,916, was dated the 17th of June, 1872, at Philadelphia, signed by the President, George N. Hill, attested by the Secretary, John S. Wilson, and countersigned by Jno. D. Scott, La., manager, for $10,000 upon the life of Louis Moulor, of New Orleans, Louisiana, for the term of his life, in consideration of $425.50, paid to the

defendant by said Louis Moulor for the benefit of Emilie Moulor, his wife, and of the annual premium of a like amount.*

At the first trial, on the 16th of April, 1874, the production in evidence by the defendants of the application disclosed an apparent falsehood on the part of the insured. He seems to be racked and riddled with disease at the very moment he "doth profess too much" his exuberance of health. The plaintiff, on account of his surprise at this collision of contradictories, was allowed to withdraw a juror. The defendants then abandoned their original defence of suicide, and not content with the general issue of *nil debet*, already pleaded on the 5th of June, 1873;† which plea challenged the plaintiff's recovery on any ground, they set up the plaintiff's fraud in making his answers. The additional pleas were filed the 17th of March, 1876, in order to raise the issue of false representation by the plaintiff.‡ His contention that the charge of fraud was inconsistent, and could not stand with honesty of conviction, was overruled. Warranty, it was held, apart from false representation, remained at issue under the plea of *nil debet*.

The case was re-tried the 4th of April, 1876. The jury, being the judges of the truth or falsehood of the insured's answers, settled the fact upon the evidence submitted to them, negatived the false representation and disease imputed to the plaintiff, and established the truthfulness of his answers by their verdict, which was rendered for the plaintiff in the sum of $11,950 and costs.‖

The learned judge was dissatisfied with the verdict; he conceived that the jury had usurped his function and decided the law of the contract. In his mind, the jury meant by

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*Record page 13.
†Record, page 9, line 7.
‡Record, page 9, lines 15-42.
‖ Record, page 10; lines 10-14.

their verdict to find that Moulor did not know, and could not know, he had any disease, but on the contrary believed himself to be sound, if not robust in health. What they negatived was intentional or conscious untruth. They vindicated the plaintiff from the charge of false representation. They could not exonerate him from the breach of his warranty. The learned judge assumed that the doctor's testimony was an admission and proof of Moulor's being diseased. The explanation of the evidence and the denial of anything amounting to disease, though sanctioned by the jury, did not find favor in the judge's sight. He adjudicated the existence of disease in Moulor, in spite of the jury. The verdict said: It is found that there is no falsehood or untruth in the plaintiff's answers. Twist the contract in law as you please, make it a warranty or a representation, the facts fit either dilemma. If a representation, the plaintiff, if he had any disease, didn't know of it; if a warranty, he didn't have any disease, and that's an end of it.

The court, nevertheless, the 15th of April, 1876, set aside the verdict and granted the defendants a new trial.* Upon the third trial, the 2d of October, 1876, the learned judge gave the jury, upon the evidence submitted at the former trial a binding charge to find for the defendants,† which *eo die* was found by a verdict.‡

The binding charge of the court constituted the cause for the previous writ of error, which was taken 14th November, 1876‖; the cause argued 12th April, 1880, and the judgment of the Circuit Court reversed.

The case was remanded and again tried 4th October, 1880, and verdict found 5th October, 1880, for the defendant.§ The plaintiff excepted to the rulings made upon the trial and

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* Record, page 10; lines 32-39.
† Record, page 13; lines 16-17.
‡ Record, page 11; line 10.
‖ Record pages, 11 and 48, lines 4-5.
§ Record, pages 28-29-30; 49, lines 12-22.

being refused a new trial, took her bill of exceptions and the present writ of error.*

Was the policy a warranty? The policy is based upon the insured's *representations*. It declares that if the *representations* and answers . . in the application upon "the full faith "of which it is issued, shall be found to be untrue in any "respect, or that there has been any concealment of facts," the policy shall be null and void.† There is no condition of *warranty* attached by the policy to the facts stated by the insured. The application makes the insured *agree* that if in any of his answers there should be "any untrue or evasive "statements, or any misrepresentation, or concealment of "facts,"‡ or the defendant should afterwards discover that any of the answers "are untrue or evasive, or that there has been "any concealment of facts,"‖ the policy should be void. The applicant is made to review his answers and agree upon the understanding "that any untrue and fraudulent answers or "any suppression of facts in regard to health"§ should vitiate the policy.

The additional pleas filed by the defendant, the 17th of March, 1876, in order to raise the issue of a *false representation*, aver and rely upon the insured's *fraud* in making his answers.

The commission of 1873,¶ issued by plaintiff to explain the suicide, gave the witness, Dr. Mathieu, his opportunity, and in answer to the fifth cross-question: "Had you at- "tended him (the insured) before his death? How long, and "for what disease? When did you first visit him, and for "what cause?" he gave his vanity full vent, as follows: "I "had attended him as his physician since 1855 for chronic "asthma, manifestations of the first stage of consumption;

* Record, pages 31–34; 49, lines 23–34.
† Record, page 14, lines 17–21.
‡ Record, page 18, lines 46–48.
‖ Record, page 19, lines 3–5, 8.
§ Record, page 18, lines 31–33.
¶ Pages 35–41.

"this was in in 1858 and 1859: afterwards for slight indis-
"positions from time to time, besides the asthma, to which
"he was constitutionally subject. I also treated him for
"scrofula all the time. The last disease for which I was
"called previous to his death was on the occasion of the
"pains in his head, of which he suffered in the night from
"December 31, 1872, to January 1, 1873. My first visit to
"him as a physician was in 1855, for asthma."*

When re-examined, by the commission of 1876,† Dr. Mathieu explains himself thus: "I knew him (the insured),
"and have known him since 1854. . . As to his general con-
"stitution, I will state that he was delicate. I treated him
"for scrofula, for the first symptoms of consumption, and for
"asthma, but *he never learned from me, nor from any other phy-*
"*sician in this city, nor did he suspicion, or have the remotest idea*
"*that he was affected with any of such diseases himself; on the*
"*contrary, he always boasted and prided himself as being a strong,*
"*healthy and robust man.* The asthma he had was the dry
"nervous, no expectoration connected therewith to make the
"patient believe he did have it. As to the first stage of con-
"sumption, there was no softening of the tubercles, and
"therefore no expectoration of tuberculous matter. As to
"the scrofula, I will state that his was very mild diathesis.
"*I did not impart to said Moulor a knowledge that he was affected*
"*with any of said three before mentioned diseases out of a feeling*
"*of humanity, a rule I never deviate from in my practice,*
"*whenever the mind of the patient might be affected thereby.*
"The company, defendant, was aware at the time they
"accepted Mr. Moulor that I was his family physician, and
"his, and had I been applied to for information as to his
"general health and constitution, or requested to fill out one
"of the usual blanks of examination by a physician, I cer-

* Page 40, lines 11-19.

† Pages 41-44.

"tainly should have stated and made known that he had "been affected with the diseases I have before mentioned. "I have never been absent from, nor ceased practicing my "profession in this city since 1854. *My name was furnished "company defendant by Mr. Moulor, in writing, as his physician, "thus enabling the company to get all desirable information from "the proper source, which information thought proper neglecting to "procure."**

The medical examiner at New Orleans is instructed by the defendant "to ask such other (than the printed formulas) "questions bearing upon the case, as he may deem proper, "and to *give any such further information* as may be elicited "thereby; and to make the *examination* in *all* respects, "*thorough*, *exact* and *circumstantial*."† The examiner must understand the application before he undertakes to make his examination, and he must also see that the applicant appreciates the full import of the printed questions put by the company. The questions are to be explained by the examiner, and the answers taken down in his presence.‡ The examiner is required to procure the certificate of the applicant's family physician, unless the examiner is satisfied without it by his own examination. The certificate must be presented "*if he considers it requisite*."‖ What does the first medical expert of the defendant testify under these instructions? That the insured was "*healthy*" in "*appearance*."§ "He has seventeen inspirations in a minute." His "*respira-"tion*" was "*full*, *free*, *distinct* and *perfectly healthy in every "part of both lungs*." "The *respiratory organs*" were "free "from any *suspicion* of disease." He was free from any *ten-"dency* to cough, catarrh, vitiated expectoration, spitting of

*Record, page 43, lines 26, 32-38, and rest of page 43, and page 44, lines 1-15.
†Record, page 20, lines 15-19.
‡Record, page 20, lines 25-30.
‖Record, page 20, line 24.
§Record, page 20, line 33.

"blood, *difficulty of breathing* or *disease* of the *throat.*"* He did not have "any *predisposition*, whether hereditary or "acquired, to *any constitutional* disease."† Accordingly the examiner said: "I do believe him to be entirely free from "*any* and *every disease* or *disorder whatsoever.*" I "do con- "sider him *in all respects safely insurable.*" I "do *advise* the "*risk.*"‡ This is the testimony of E. W. Thurm, who was graduated a physician at Wurtsburg, Germany, in 1862, and who is the defendant's witness.‖ The second medical examiner of the defendant, under the same instructions,§ testifies: The insured "has the appearance of *robust* health "now." He has "seventeen inspirations in a minute." His "respiration is *full, free, distinct* and *perfectly healthy* on "the *right* side, with *ordinary* respiration, and on the *left* with "*forced* respiration." "The *respiratory organs* are *free* from "*any suspicion* of disease." "He is *free* from *any tendency* to "catarrh, vitiated expectoration, spitting of blood, *difficulty* "of *breathing* or *disease of the throat.*"¶ He has no *predisposi-* "*tion,* whether hereditary or acquired, to *any constitutional* "disease." "I do believe him to be *entirely free* from *any* "and *every* disease or *disorder whatsoever.*" "I do consider "him *in all respects safely insurable.*" "I *advise* the risk."° This is the testimony of Dr. J. S. Lewis, the defendant's second medical witness, who was particularly consulted upon the case, and pronounced the insured "an *excellent risk.*"*

What do the defendant's *agents* at New Orleans *report?* They are requested to exhaust their knowledge and communicate it to the company. John D. Scott, the general agent, says: "I have known him (the insured) *well* "about *eight* years." "I do believe that he is now in good

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*Record, page 21, lines 7-13.
†Record, page 21, lines 31-32.
‡Record, page 21, lines 33-4; 37-8,
‖Record, page 21, lines 45-46.
§Record, page 23, lines 6-22.
¶Record, page 23, lines 19, 44-49. 24, lines 1-3
°Record, page 24, lines 22-25; 28-29
*Record, page 22, lines 13-14.

"health, and has a healthy constitution; *asked Dr. Lewis* "*particularly about his case. Says he is an excellant risk.*"* ". . . "Since I have known him he has been *a very healthy* "man." His family has not, *as I can learn*, been afflicted "with *pulmonary* complaints, or *any other* disease that tends "to shorten life." "I *do decidedly* consider him in *all respects* "a *proper* person to be insured, and do *recommend* him as "such."† S. A. Taskins, the defendant's other New Orleans agent, testifies that he saw the insured *this* day, namely, June 18, 187-, the date of his report. "I have known him "for *eight* years." "I do believe that he is now in *good* "*health*, and has a *healthy constitution*." His family has "*not*, "*to my knowledge*, been affected with *pulmonary* complaints, "or *any other* disease that tends to shorten life." "I do "consider him *in all respects* a *proper* person to be insured, "and *recommend* him as such."‡

II.—ASSIGNMENTS OF ERROR.

The plaintiff assigns for error that,
The learned Judge erred:

1. In refusing to affirm the plaintiff's eleventh point,‖ to wit: "The "answers to questions 12 and 13 in the application must be taken together, "and *may* bear the meaning that the insured had not been attended by a physi- "cian for a specific disease or diseases since 1847, though he had been attended "during the time by a physician for general advice or treatment by way of "preventing rather than curing disease."

2. In refusing to affirm the plaintiff's twelfth point,§ to wit: "The jury are "entitled under the evidence to find as a fact, according to the certificates or "reports of the defendants' agents and medical examiners, that Louis Moulor "did not have any affection which in ordinary parlance reaches the gravity of "a disease."

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*Record, page 22, lines 12-14.
†Record, page 22, lines 17-23.
‡Record, page 24, lines 43, 44, and 47: 25, lines 5-6, 10-14.
‖Record, page 46.
§Record, page 46.

3. In refusing to affirm the plaintiff's thirteenth point,* to wit: "The tes-"timony of Dr. Mathieu must be regarded as adverse upon the point of Mou-"lor's health to the plaintiff, and if the admissions contained in it can be "reconciled with the other evidence they will be interpreted as extorted from "a reluctant witness in aid of a consistent theory of evidence as a whole."

4. In refusing to affirm the plaintiff's fourteenth point,† to wit: "The "terms of the policy are not the language of Moulor, but the pharseology of the "defendants, and if any ambiguity or difference of meaning exists in its lan-"guage, the insured is entitled to take, and the court will give the interpreta-"tion which is most favorable to him."

5. In refusing to affirm the plaintiff's fifteenth point,‡ to wit: "Unless the "fact of Moulor's disease was known to him, or he had the means of knowing "its existence, his denial will be construed with reference to his conviction, and "not be converted into a warranty against the existence of disease."

6. In refusing to affirm the plaintiff's sixteenth point,‖ to wit: "To make "the insured warrant the non-existence of diseases which are inaccessible to his "consciousness, the warranty must not be wrapped up in general language, but "must be put in a form which will bring home to the insured the plain mean-"ing that he stakes his interest in the policy upon the non-existence of "unknown diseases."

7. In refusing to affirm the plaintiff's ninth point,§ to wit: "If it "appears by the evidence that the insured did not know, and could not know, "that he had any disease, his answer that he had none does not preclude a "recovery on this policy."

8. In refusing to affirm the plaintiff's tenth point,¶ to wit: "If the evi-"dence shows that the insured did not know, and could not know, that he had "any disease the representations contained in the answers, though construed as "conditions precedent or warranties are not 'untrue in any respect,' according "to the meaning of the policy."

9. In charging the jury as follows, to wit: "It is of no consequence, in "case he (the insured) was then, or ever had been, afflicted with either of the "diseases named (scrofula, asthma or consumption), the policy was thereby "rendered void, whether he knew the answer to be untrue or not, he bound "himself for its correctness, and agreed that the validity of his policy should "depend upon its being so." "That he (the insured) did not know he was

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* Record, page 46.
† Record, page 46.
‡ Record, page 46.
‖ Record, page 46.
§ Record, page 45.
¶ Record, pages 45-46.

"thus afflicted, is of no importance whatever, except as it may bear upon the "question, *was he so afflicted?* If he *was*, his answer (for the truth of which "he bound himself) was untrue, and his knowledge, or absence of knowledge, "on the subject, is of no consequence." "You must determine whether the "insured was at any time afflicted with either of the diseases named. If he "was, his answer in this respect was untrue, and notwithstanding he may "have ignorantly and honestly made it, the policy is void and no recovery can "be had upon it."*

10. In refusing to affirm the plaintiff's seventeenth point,† to wit: "The "policy sued upon in this case, is a contract which was made to be performed "in Pennsylvania, and its construction must be governed by the law of Penn-"sylvania."

11. In refusing to affirm the plaintiff's eighteenth point,‡ to wit: "If there is "any difference in the interpretation of policies of life insurance between the "U. S. Courts and the courts of Pennsylvania, the distinction taken by the "Pennsylvania Courts must prevail in the construction of a Pennsylvania "contract."

12. In refusing to affirm the plaintiff's fourth point,‖ to wit: "That the "defendants cannot contradict the evidence produced, and not contradicted by "them at previous trials of the insured's insanity."

13. In submitting the fact of the insured's suicide, while sane to the jury when the evidence was uncontradicted that he committed suicide while insane.§

14. In refusing to affirm the plaintiff's fifth point,¶ to wit: "That the "evidence produced by the defendants at the previous trials of the insured's "insanity when he committed suicide and not contradicted, is to be accepted as "proof of the fact, and if not acted upon by the defendants by returning the "premium and availing themselves of the right to annul *ab initio* the contract "of insurance, in order to escape liability under the policy, precludes them "from raising the defence of the insured's insanity when he committed suicide "after they had abandoned such a defence on the previous trials before the "jury."

15. In refusing the affirm the plaintiff's twenty-second point,° to wit: "That the defendants not having made a tender or return of the premium all "precluded from setting up as a defence to a payment in full a privilege of "recission of which they have not availed themselves."

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* Record, page 33.
† Record, page 46.
‡ Record, page 46.
‖ Record, page 45.
§ Record, page 33, lines 43–47.
¶ Record, page 45.
° Record, page 47.

16. In refusing to affirm the plaintiff's twenty-third point,* to wit: "That the waiver by the defendants of the right to rescind the policy upon "the suicide of the insured while insane, is a matter of fact which should be "submitted by the court to the jury for determination," except with a qualification, to wit: "We answer, certainly; the plaintiff might show a waiver by "the defendant of any right of defence it possessed under the policy by sub-"mitting proper evidence of the fact. But the court sees no such evidence "here."†

17. In refusing to affirm the plaintiff's eighteenth point,‡ to wit: "That "the defendants were bound if they elected to treat the contract of insur-"ance as 'off,' on account of the insured's insanity when he committed "suicide to return the premium, and their failure for a period of at least "four years to make the re-tender is an abandonment of the right"

18. In refusing to affirm the plaintiff's twentieth point,‖ to wit: "That "the exception which purports to rescind the policy by a return of the "premium in the event of Moulor's suicide while insane, is a condition sub-"sequent, and as such is void, because it could take effect only upon an act "by Moulor which he could not perform."

19. In refusing to affirm the plaintiff's sixth point,§ "That the denial "by the defendants of any contract is precluded by the defence of its breach."

20. In refusing to affirm the plaintiff's seventh point,¶ to wit: "That "the judgments pro and con on the issue of a breach by the insured of the "contract of insurance settled by necessary consequence the preliminary "fact of the contract's existence."

21. In charging the jury as follows, to wit: "Your verdict in this event "(suicide by the insured while insane) should be in favor of the plaintiff for "such premiums, which, as the endorsements on the policy show, amount to "$425.50. To recapitulate, if you find the policy avoided by means of such "untruthful answers, or by means of the act of suicide (which presupposes that "you find the insured *sane* at the time of committing it), your verdict will be "for the defendant; otherwise it must be for the amount of the premiums paid, "$425.50."°

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* Record, page 47.
† Record, page 33.
‡ Record, page 46.
‖ Record, page 46-7.
§ Record, page 45
¶ Record, page 45.
° Record, page 33.

"The defendants must be estopped from denying the "competency of the physician selected to make the exami- "nation, the physician being the agent of the defendant, "and not of the plaintiff."*

Plaintiff offered in evidence statement of the agent who effected the insurance. The objection to its admission was overruled, and the ruling was sustained. "It was not error "to admit the statements of Dr. Dean, the defendant's exam- "ining physician, and Holmes, their agent at Rochester. "These were parts of the papers on which the policy was "issued, and as the defendants themselves had introduced "the other papers, being all, except the statements of the "agents, and made them part of the evidence in the case, "there was no impropriety under such circumstances that "all the papers should appear in the case. It was the *right* "of the *plaintiff* to lay before the jury *all* the *papers on which* "the *company acted* when it decided to grant the policy."† The reports of the defendant's agents, who effected the insurance, embody the transaction itself. The agents of a corporation are the only actors in the negotiation. Their reports are not only admissions against the defendant; they constitute the transaction and become the *acts* of the corporation. The defendants are bound by their admission which negatived any disease in the insured as an estoppel. The agent personates his principle, although he speaks in the character of the insured.‡ If the agent's declarations are a part of the *res gestæ*, they bind the company; that is, if they are so immediately connected with the insurance as to form part of its history.‖ The agent binds the company by

*Hallman v. Life Ins., 1 Wood. U. S. C. C. R., 677.

†Rawls v. Am. Mut. Life Ins. Co., 27 N. Y., 282.

‡Ins. Co. v. Wilkinson, 13 Wall., 222; N. J. Mu. Life v. Baker, 4 Otto, 610.

‖Bigley v. Williams, 30 P. F. Smith, 107; Northwestern Mutual Life v. Roth, 6 Norris, 409; Mutual Benefit Life v. Cannon, 48 Ind'a, 264; Dean v. Ætna, 5 Big. (N. Y. App'ls), 377; Hoffman v. John Hancock Mutual Life, 5 Big., 593; Ins. Co. v. McCain, 6 Otto, 84.

his own statements, though put by him in the insured's mouth.* A condition that the agent shall be considered the agent of the insured will not relieve the company.†

The principal is bound not only by the express statements, but by the *notice* contained in the agent's report. He communicated an offer for $4,000 insurance, stating that if the company did not wish to take that amount, he could insure part in a different company. The principal declined $4,000, but granted a policy for $3,000. The defence to the policy was, that the additional $1,000 insurance effected in a different company was not notified at once as required by the policy. The report of the agent was *notice by implication*, and bound the company as evidence of compliance with the policy.‡

But the question is not be decided in this off-hand way by a set-off of admissions which exclude a thorough investigation.

The preliminary falsehood imputed to the insured is contained in his answer to the 12th question in the application: "How long since the party was attended by a "physician?" "For what disease or diseases?" Answer: "Not since the year 1847, when he had the yellow fever." Question 13, "Give the name of the party's usual medical "attendant." Answer: "Doctor Mathieu of New Orleans."

The answers to the questions 12 and 13 in the application must be taken together, and may bear the meaning that the insured had not been attended by a physician for a specific disease or diseases since 1847, although he had been attended during the time by a physician. The absence of any specific disease explains the answer that he had not been attended for any disease since he had been

*Flynn v. Life Assurance Society, 7 Hun., 387.
†Southern Law Review, Dec. and Jan. Nos., 1879-80.
‡Farmers' Mu. Ins. Co. v. Taylor, 23 P. F. Smith, 342.

attended in 1847 for yellow fever. But he does not deny general medical attendance since that date, nor that such attendance was habitual and constant on the part of Dr. Mathieu; on the contrary, the insured's statement suggests an uninterrupted medical attendance. "Dr. Mathieu is my "*usual* medical attendant," that means not only habitual, but frequent and regular attendant. The two answers so far from being inconsistent with each other and with the facts of the case, serve to complement each other and at the same time explain the testimony. A general regimen of hygiene is indicated to avoid the proneness to disease, on the true principle that prevention is better than cure. A Chinese doctor is paid for prevention, and is held accountable for disease.*

No disease exists, and therefore the answers are not only consistent with each other, but interpret by their juxtaposition the significance which each carries with it. Attendant means in one's train, a regular follower. Not an occasional visitor, but a steady, constant one. A "usual attendant" intensifies by both words the unbroken regularity of the visitation.

The reference by the insured to his family doctor gave the company the means of obtaining all the information they wished. This put them in the position of knowing more than he did, and estops them from relying upon what *he* might know, because his answer is *supplemented* by his *Dr.'s knowledge* and must be taken with reference to what the expert, whom he has invoked to aid him in telling the company his condition, *would have said*. The option of the company to rely upon their own independent diagnosis was the deliberate choice of their agents, who were *required* by the delegation to elect *whether* or *not* to call in the insured's family doctor, and the company is bound by the election which

*Attendance is not *proof* of disease, for which Dr. treated injured, Boos v. World Mutual Life Insurance, 5 Big. 355.

they have made.* The doctor was always ready and on hand to testify.†

On the main question, whether the insured *had*, or had had any of the three diseases, consumption, scrofula or asthma, the burden is on the defendants. They must make out by clear evidence that the insured did have them.‡

Before Doctor Mathieu's testimony is taken into consideration, his position as a witness must be fixed. The original commission was issued by the plaintiff, to examine him upon the insured's suicide. The cross-examination developed a new and independent point, the insured's falsehood in speaking of his health. The plaintiff was surprised by this unexpected turn, given to the case by Doctor Mathieu's evidence, and issued a second commission to explain his testimony. The plaintiff, however, used neither deposition, as the defendant, and not he, was trying to make out the falsehood. The defendant could not use the testimony as an admission without taking the explanation which qualified and formed part of it.‖ And the defendant accordingly put both commissions in evidence.§

Doctor Mathieu became their witness. "At the trial "he is *necessarily* the witness *of* the *party* who *reads his* "*deposition*. The case would present the strange spectacle "of a party offering his own witness with the benefit of "a cross-examination, which is *denied* to the party against "whom he is offered. The latter may have *declined to* "*use* the *deposition*. . . . He has *conducted* the *examination* "*with a view* only *to particular facts*; in the course of which "*other* facts which he was not apprised of as being considered

*Higgins v. Phœnix Mutual Life, 74 N. Y., 6.

†Record, page 44, lines 4-1[illegible].

‡Campbell v. N. E. Ins. Co. 98 Mass. 381. Piedmont & Arlington Life v. Ewing 2 Otto 377.

‖Mutual Benefit Life Ins. Co. v. Newton 22 Wall., 32.

§Record, page 13, lines 4-10.

"important by the other side, are *spoken of* in a way that he "afterwards finds *prejudicial* to him. Now as to these, he is "led into a surprise which he would have avoided, if his "attention had been led to them by a direct examination "from the other side."* The judge in a recent case suggests a thorough cross-examination to protect the parties thus surprised. Afterwards if the disposition is used by the opposite party it will be at least equal and fair to both sides, who have then both cross-examined.†

Doctor Mathieu's statements must be taken as *adverse*. What he admits in the plaintiff's favor, the *non-existence* of diseases, but only *predispositions*, must be accepted as the true import of his testimony. This would be the interpretation on the theory of evidence. But the construction does not depend for its validity upon theory; it coincides with and corroborates the evidence of the other medical experts of the insured, and of the defendant's agents. The testimony of the clairvoyant, Doctor Mathieu, must be interpreted in connection with the judgment of the two other medical examiners, of the insured, and of the defendant's agents, all of whom were examined upon the point. Doctor Mathieu's transcendental theories and practice of medicine are best explained by himself. Without a knowledge of his divination the testimony which he gave would be inconsistent with every particle of evidence in the case. But, judging him by his own standard, his testimony agrees with the other witnesses, and admits that the insured had *no* disease. The germs or embryos which the Doctor saw in his mind's eye, were invisible to any other doctor, and were undreamt of by the insured. If, therefore,

*Gordon v. Little, 8 S. & R., 555. Agent of Insurance Co. made insured's agent by being *called* as insured's witness. Rohrbock v. Ins. Co., 62 N. Y., 47, though by law Co. could not make its agent the agent of insured. Utica Ins. Co. v. Toledo Ins. Co., 14 N. Y., 85; Bently v. Ins. Co., 17 N. Y., 42; Rowley v. Ins. Co., 36 N. Y., 550; Ins. Co. v. Ives, 56 Ill., 402.

†Martin v. Dearie, 9 Phil. R. 186.

Doctor Mathieu's testimony is brought down to tangible realities, as he declares in his deposition that it should be, and interpreted in aid of a consistent theory of the evidence as a whole, his testimony can be reconciled and stand with the other evidence, which in its agregate force negatives any disease. If, on the other hand, his testimony should be isolated, and treated as proving anything by itself, its extent would be that the insured, if he had any vestige of disease, neither knew it or could have known it.

2. The application makes the insured *declare* and warrant his *answers* to be "*fair* and true." The answers are equivalent to representations and are so classified throughout the policy and application. There is no *warranty* of the *facts* asserted in the answers.

The only way in which an answer about a fact inaccessible to consciousness can be *absolutely* true in *every* sense and false in *none*, is by making the words fit and cover the thought in the mind. The words are true because they convey with exactness to others the contents of the mind. Let the mind attempt to express in language what it does not possess, and the words become false. I am asked if I have consumption, and without any knowledge of the fact, and with every reason to believe that I have no such disease, I reply: Yes. Is that true? It is false, because I state what I neither know nor believe; false in law, because I do not know what I affirm; and false in reality, because I state the contrary of what I actually believe. It might turn out that I had consumption at the moment when I said so, though I did not or could not know it; would this make my answer true? It would none the less be a lie, but the accidental coincidence of a disease with my reckless or willful assertion of it, saves me from the consequences of a falsehood. A lucky hit by haphazard saves me from an indictment for

perjury. The law does not punish the crime unless the fraudulent intent, evidenced by deliberate or reckless disregard of truth, is consummated by the overt act. Had the fact turned out as I believed, the statement would have been false, and I would have been guilty of perjury and punished. The guilt is the same in both cases, but the law requires both the guilty intent and the embodiment of it in act to concur. By chance a stray act intervenes and frustrates the consummation of the intention. Is the element of crime to be found in the accident? It is, on the contrary, to be lodged in the guilty intention, where morals puts it. *Actio recta non erit, nisi recta fuerit voluntas.** But the law says I recognize no crime until the guilt is proved by external circumstances. It exists, but I do not punish it until manifested.

To speak the truth according to one's conviction does not, if the belief is an error, convert the martyrs for conscience sake into liars. Truth telling is speaking from conviction. If truth is independent of conviction and depends on chance, an inveterate liar might be a model of truthfulness. The insured is forced into a dilemma on this theory from which there is no escape. If he speaks according to his knowledge and conviction, he may be in error and the insurers claim a liar. If he disregards his knowledge and his conscience, and answers at random, he lies again. He might, if he knew the trap, avoid it by saying: I don't know whether I have any disease or not; if I have, it is latent, and has given no symptom of its existence. The insurers give him no such loop-hole. They have cornered him, and don't mean to let him escape. They *make* him answer, *Yes* or *No*, *by express command*, and leave *no space* in their blanks for a *longer* reply.†

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* S. Ep., 95.

†Record, page 17, line 43.

Were the answers warranties by the insured or representations?

The terms of the policy are not the language of the insured, but the phraseology of the defendant. If there is an ambiguity or difference of meaning in the language, the insured is entitled to take, and the court will accordingly give, the interpretation which is most favorable to him. The meaning of the contract is determined by the sense which he understood it to convey. The defendant created the twofold aspect, and is bound by either meaning which the insured accepted.* Moreover the construction of the language must be *against* the defendant, who dictated the terms of the policy.†

Hence the terms of the contract must cover an *express* warranty against the risk.‡

The policy does not contain the word "warrant," and the application, which could create no *independent* liability but must be brought into the class of representations by the *limitation* of the policy itself, employs it but once.

Warranty and truth are incongruous ideas. Truth refers to conviction; warranty relates to the existence or non-existence of facts, which are independent of the mind. The truth of a *statement* or *answer*, therefore, *necessarily* implies a representation, and cannot relate to a warranty. The choice and collocation of words by the insurers indicate that they meant to recognize the distinction, and make *intention* the test of veracity. Representation is the sole definition of the policy, and is made the *consideration* and *basis* of the contract.‖ The application says, if representations *and* answers are untrue in any respect, if any untrue or

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*Throop's Verbal Agreements, § 188.
†National Bank, v. Ins. Co., 5 Otto, 673.
‡Note 5, Big. 130, 405.
‖Record, pages 13, lines 24-5; 16, lines 17-19.

tract of insurance. If a counter-policy is to be set up by construction under the original insurance, how are the terms to be made out?

If the contract meant to make an unknown disease forfeit the claim, the language should have expressed that meaning. The question might have been put thus: Do you stake your interest in this policy upon the non-existence of consumption in your system? Do you bet the sum insured against nothing, that vivisection wouldn't disclose consumption? Do you mean to give me gratis without a premium, a counter-insurance against the death-risk; which I pretend to have taken? If you die from any disease which I have enumerated, and I have mentioned all I could think of, I get rid of my bargain, although I hold you fast to yours. If you knew you had the disease, the attempt to impose the risk on me is a fraud; if you did not know, then you took the risk instead of me. I have set up my little game; it works on the principle of heads I win, tails you lose. I warrant myself disease-proof or death-proof. No wonder the Scotch judges say that this is impious! An insult to the Almighty!

The defence to an action on a life policy was a breach of the warranty by the insured contained in her declarations and statements, which she made a condition precedent to her right of recovery. She said she was in good health, and denied, in answer to a question, that she had *any disease*, or symptom of disease, although she died within six months of a disease of the liver, which resulted in dropsy. The company claimed the right to an issue, in order to prove by a verdict that at the date of the insurance such a disease existed in the constitution of the insured, whether she knew it, or could possibly have known of its existence. The legal import and extent of the condition were contained in the pro-

posal and the declaration of the insured that she had no disease. Said the Lord President: "If I thought the view "pressed by the insurance company was law, I should say "there was an end to all life insurance in time to come. But "I conceive that the doctrine of warranty is pushed by them "to an extravagant length. Though there are equivocal "expressions in the authorities, I think it is impossible that "it could be meant in any of them to be laid down, that what "is called a *warranty in regard to the person effecting* an *insur-* "*ance*, is more than a warranty of *what was known to the person* "or *should have been known*, *unless* he was *guilty* of gross and "*inexcusable negligence*. I think it is *impossible to conceive* that "the warranty goes farther. The doctrine pressed by the "insurance company just amounts to this, that when a per- "son dies, a *post mortem* is warranted, and if anything should "be found that indicates an *incipient latent* disease, though "there were *never* any symptoms, and there is no indication "of fraud or gross negligence, there is a breach of the war- "randice, which voids the insurance. I can arrive at no such "conclusion. Such a doctrine is not deducible from the *strong-* "*est* of the authorities. If a person is not guilty of any negli- "gence in acquiring knowledge of his own condition; if this "is not established, there is *no breach of warranty*. It appears "to me extravagant that an insurance may be voided upon "an inquisitorial investigation into latent evils in the consti- "tution of the party, who has no indication of disease at the "time of the insurance; upon a latent defect in the consti- "tution which, though not the cause of death, might have "been." "The proposition that these expressions amount "to an absolute warranty," said Lord Fullerton, "not "only that she never felt herself to be affected with any "complaint, or exhibited any symptom of complaint, but "absolutely, that whether felt or not, no disease in any form

"existed in her constitution, is rather startling, and it is "necessary to examine the ground on which it rests." "Let "a fair * * construction be applied to the terms 'good "health,' in which the whole plea of the defenders is rested. "It occurs in the description of the state of a *living* indi- "vidual—which state, in *so far* as *evident* to *others* or *precepti- "ble by himself*, can *alone* form the *subject* of *description*, and "when so employed, does it denote anything more than the "absence of any *ostensible* or *known*, or *felt symptoms* of dis- "order? Would any man, however scrupulous in the use of "terms, hesitate to declare himself *on soul* and *conscience*, in "perfect health, so long as he felt himself in the perfect "and healthy exercise of all the functions by which health "could be tested; and was utterly unconscious of any "derangement by which those functions were likely to be "impeded? Or could it be with any show of reason charged "against him as an *untruth*, because for anything he knew, "there *might*, by possibility, *exist*, at the moment, some "*hidden defects* or *malformation*, or *morbid derangement*, inoper- "ative externally for the time, but sure at some future period "to prove fatal? If this were requisite to justify the decla- "ration of good health, it is clear that *such a declaration never* "could *with certainty* be made; and *this goes far to settle the* "*point* in dispute. The point is, the meaning of a term in a "contract, and the term occurs in a declaration asked by "one party and given by the other. Now if *in one sense* of "the term it admits of being declared in the *negative* or "*affirmative*, and if in the *other sense*, it *never can be the subject* "*of an affirmative or negative, can there be a doubt in which sense* "*the term is used?* If the term 'good health,' means the "perfect, conscious enjoyment of all one's faculties and "functions, and the conscious freedom from any ailment, "*the question may be asked and answered;* but if the term is

"construed as meaning an absolute freedom from all defects "or derangement, imperceptible as well as perceptible, *the* "*declaration is one which cannot be made*, and which it "would therefore be absurd to ask. And when the "defendants represent it *as a warranty, nothing is* "*gained* in the inquiry, because the question "occurs, *What is it which was warranted?* 'Good health,' "and that just leads to the same inquiry in *what sense* that "term was employed; for it will be observed, there is here "no *express* warranty by which a party may, and often does, "take the risk of events or circumstances on which he pos- "sesses no present information. Here the warranty is at "best only implied from the term of a declaration, asked by "one party and given by the other, and which is made part "of the contract; and as the term is used in these declara- "tions, its sense must be determined by that which it evi- "dently bears in the passage containing it. The provision "that the declaration shall form the basis of the contract, "may be held to render the *declaration equivalent to a warranty;* "but still the point, *what* is declared, and consequently *what* "is *warranted, depends on* the *construction of the declaration*, and "in choosing between two senses of the disputed term, accord- "ing to one of which a party *may declare*, while according to "the other it would be absurd to ask, and *impossible to give* "a declaration, the former sense *must, according to every rule* "*of construction*, be adopted. * * * In my opinion, the "*statement* in the declaration here was, in its sound construc- "tion, *true, if* the *party* making the declaration *never had any* "*consciousness of ailment, and never had exhibited* any symptoms "of ailment. According to the ordinary and *only* intelligible "sense of the term in the circumstances in which it was "used, she was in good health, if she neither was conscious "of, nor exhibited the slightest symptoms of disease. Nothing

"short of an act of parliament, adds LORD JEFFREY, would "induce me to put a different construction on such a con- "tract. *Untrue* has *two* meanings, a *moral* and a *physical*. In "the latter, a statement is untrue, when a person is the vic- "tim of imposition. It is only untrue in the former sense, "that will invalidate a policy of insurance, when the insured "declares what he *knows to be untrue*, or *might have known by* "*due care and inquiry, or conceals the truth in the same manner.* "* * * He declares that he has no disease or *unease.* "This must mean so far as he knows, or possibly can know. "Let us bring this to a practical test. If the defenders' con- "struction of the warranty be the true one, can they deny "that it would be but fair to set forward its tenor accord- "ingly? Now I shall like to see those officers that would "*de futuro* insert their intention in their policies thus: Per- "sons insuring in this office will please take notice, that "*though they have always enjoyed good health, and the doctors on* "*their examination could discover nothing amiss, still, if at any* "*future time it shall turn out that they had in them the germ of* "*a disease of a serious nature, which if known to the officers* "*at the time of insurance would have made them hesitate to* "*insure, the policy shall be void.* If they are honest, they "should put this in their policies; for it is proper for per- "sons insuring to know that this is the state of the "law. *It is clear, that in the knowledge of this no one would* "*ever insure.* I think *that is sufficient to determine the present* "*question.* The insurance company *know* they have *no case*, "and the view of the insurance company is, that the *declara-* "*tion of the insured is a counter-insurance;* that he gets insured "on the one hand, but on the other insures against the risk "arising from a thing unknown, and which could not be "known. They construe his declaration as of this kind: "'I positively declare that I have not in the interior of my

"skull, heart, or anywhere else, the seeds of a fatal malady!" "To make such a declaration would be *impious*, and yet it is "the only shape in which the guarantee contended for could "be put."*

There is another aspect in which to look at the turning-point of warranty or representation. The representations of the insured are declared to furnish the *consideration* for the policy. The representations do constitute a consideration, which is furnished by the insured. His resources of knowledge which he contributes about himself, serve in part as an equivalent for the insurers' undertaking. The risk could not be calculated without a disclosure made by the insured. A *warranty* is not a consideration. The fact which the warranty covers, is a part of the risk, which the insurers take. Let the warranty *except* the warranted fact from the risk; then do they not insure against the excepted fact. There is no insurance, and therefore no need for a consideration.

The answers, therefore, cannot be warranties, but must be what the policy makes them, representations. What then is a representation?

A representation, statement, or declaration is not a *fact*, but a fact *as conceived by the mind.* The words express what the mind perceives and knows, they exhaust the contents of the mind, portray or exhibit facts which have entered the mind. A fact which is *inaccessible* to the mind cannot be bodied forth from it, because never having got into the mind, it cannot be put out of it. Let the fact once get in, and the mind to be true to itself, must reflect the fact as it appeared to its consciousness. A faithful reproduction of facts which have penetrated the mind is *truth of statement*, a representation

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*Hutchinson v. National Loan Fund Assurance Society, 7 Court of Session Cases, 2 Series 467 S. C. 3 Bigelow's Life and Accident Reps. 444.

or counter-presentment of what has first been presented to the mind.

3. The practical result of the construction which would make the terms of the policy warranties is to deprive it of any effect, in spite of the maxim of law *ut res magis valeat quam pereat.* The policy defines the statements to be representations, and that import cannot be denied them in any event. If they are also warranties, Moulor never effected any insurance upon his life. His statements could not be at the same time true and also false. But if they were true as warranties they were false as representations, and conversely if they were true as representations they were false as warranties. By the use of language in two senses, as it might turn out to be most serviceable, the defendants would get off, whichever way the plaintiff sought to hold them. This would be ideal insurance. Fortunately no court would tolerate such an abuse of language.

4. The policy should be governed by the law of Pennsylvania,* where the defendants have their office, and where the contract was to be performed. A contract was made in Virginia to be performed in New Jersey, the action was barred by the New Jersey statute of limitation in six years.† New Jersey law forbids a foreign insurance company from doing business in New Jersey, but persons in New Jersey were insured by a Pennsylvania company. A Pennsylvania contract and governed by Pennsylvania law.‡ A subscription in Indiana to the stock of an insurance company in Illinois is governed by Illinois law.‖ The assignment, although delivered to the holder in Maryland, was a New York contract. §

*Brown v. Camden & Atlantic R. R., 2 Norris, 316.
†Spratley v. Mutual Benefit Life Ins. 11 Bush.,(Ky. 1847,) 443.
‡Columbia Fire Ins. v. Kinyon, 8 Vroom., (N. J. 1874,) 33.
‖Payson v. Withers 5 Bissell, U. S. C. C. R., 278.
§Barry v. Equitable Life, 59 N. Y., 587.

As the parties did not have the law of the place where the contract was made in view,* the contract is interpreted by law of place where it is to be executed.† And the law of that state expounded by its own courts must be followed by other courts passing upon the contract,‡ hence a policy of insurance issued by an English company, and to be paid in England, was governed by English law, though the holder was French and the ship was French.‖ General rule.§

The case, which declares the law of Pennsylvania, contains the following condition:

"This policy witnesseth that the Washington Insurance "Company, in consideration of the representations made to "them in the application for this policy, and the sum of $212.80, do insure the life of . . . Eureka Randon.

"This policy is issued, and accepted by the assured, "upon the following express conditions and agreement: ". . . if *any* of the *statements* or *declarations* made "in the application for this policy, upon the faith of "which this policy is issued, shall be found *in any re-* "*spect untrue*, . . . then in *any* and *every* such case the "said company shall not be liable for the payment of "the sum insured, or any part thereof, and this policy shall "be null and void, and shall cease and determine."

The application contained the following: "Has the "party consumption, or any disorder, infirmity or weakness "tending to impair the constitution? Answer.—'No.' The "application continued: "It is hereby declared that the

*Ruse v. Mutual Benefit Life, 23 N. Y., 516; St. John v. American Mutual Life, 2 Duer 419; Pomeroy v. Manhattan Life, 40 Ill., 398.

†Story§270 n. 3; 272 a; 304 b.

‡277.

‖278 a.

§280.

This court would reverse the Supreme Court of Pennsylvania, if that court, after *Schaible* vs. *Washington Life Ins. Co.*, and *Power* vs. *City Fire*, *Supra*, decided that such a contract as the policy in suit, constituted a warranty. The Constitution of the United States prohibits a State court, as well as a State Legislature from violating the obligation of a contract. A change of judicial decision is also recognized in Pennsylvania as such a violation, 9 *Am. Law Rev.*, 381. If the Supreme Court of Pennsylvania must adhere to its original decision, because it constitutes the law of the contract, how can the Supreme Court of the United States disregard that Pennsylvania adjudication? If the Supreme Court would reverse a contrary decision on that ground, they would, of course, maintain the original decision. It surely makes no difference in the principle, whether the case comes up directly to this court or comes up on error from the Supreme Court of Pennsylvania.

This is not in conflict with the course of decision by this court in reference to commercial law,* because the contract of insurance is not a commercial instrument.†

5. The defendants did not return the premium because they discovered the mare's nest of a breach of warranty. This led them to withhold the re-payment and stake their case upon the warranty. They kept the premium which belonged by the suicide clause, to the plaintiff on their own construction of the policy, in order to escape any payment at all. They, therefore, kept the premium to insure themselves against the risk of losing the suit, and the premium was an equivalent to the company for the risk of defeat.

The provision in the policy to repay the premiums, in the event of insane suicide, instead of the sum insured, if admitted as a principle of insurance, works both ways: If the

*Oates v. Natl. Bk., 100 N. S., 239; Rr. Co. v. Nat. Bk., 102 N. S., 31.
†Paul v. Virginia, 8 Wall, 168.

insurance company can decline the risk after it has attached, and been incurred, the widow can effect an insurance upon her husband's life after his death. She can refuse the premuims and elect the sum insured. Would Insurance Companies run after such premiums? There is no such post-mortem insurance or post-mortem escape from insurance. Rescission is out of the question. The defendant company can't rescind for the best of all reasons. Death has fixed the risk and merged the premium in the sum insured. The event which was to give them the option to rescind, was the identical event which destroyed the option; death by insane suicide. There is no condition subsequent upon which a rescission could operate. Suicide, if while insane, is not a collateral thing which can be severed from the death and be treated apart from it as an independent factor, which intervened to bring it about as in the case of suicide while sane. There the criminal act is a foreign element, which produces the death and is dealt with as the moral agent accountable for it. There is no moral element in insane suicide. It is on this ground* that the law refused to recognize it as the act of the suicide. The death results from disease and is nothing but a physical fact. It is comprehended in the category of death-risks insured by the defendants. How can they except insane suicide from the list by an after-clap?

The risks may be subdivided, and insane suicide might be excluded from them.† But how can the exact function be converted into a different thing from itself?

6. The defense which the company originally made on the first trial in 1874, to the plaintiff's suit was the insured's suicide. This defense was subsequently abandoned and on the re-trials in 1876, the single issue was the breach

*Life Ins. Co. vs. Terry, 15 Wall, 580.
†Bigelow vs. Berkshire Life Ins. Co., 3 Otto, 284.

of warranty. On the re-trial in 1880, under the judgment of the Supreme Court reversing the Circuit Court judgment, the plaintiff offered to prove what had been the issue on the trial in 1876, which ended in the judgment reversed by this court.* An exception was taken to the rejection of evidence on the ground that the defendants were bound to present their whole defense at the trial, and could not be permitted to experiment upon the plaintiff by making him try in succession any number of points which they might see fit to raise out of the labyrinth of provisions contained in the policy and application. The plaintiff's right is not to be measured by the length of the defendants' purse. But if the defendants are at liberty to select one ground of defense at a time and to compel the plaintiff to come up to this court of last resort on each and every point of defense, what plaintiff in this class of cases, where a provision for the destitute is the theory of insurance, could maintain the struggle with a rich corporation? The plaintiff's means would be exhausted, and the legal remedy would become a tantalizing mockery. Apart from the expense, what would be the result in time? The trial was in 1876, and the judgment of reversal in 1880. It would require but a few separate grounds of defense, economically put forward, one at a time, to protract the litigation throughout the widow's life-time, and leave it as a legacy to her descendants, who might not be able to combine and prosecute the claim to a final judgment, if finality could be predicated of such an endless succession of judgments. Upon this practice the opinion of the Supreme Court has been trenchant. "A party can no

*If the verdict does not disclose the ground of the jury's finding evidence is competent to prove the actual issue tried. Aiken v. Stewart, 4 W N., 180, 1876; Morgan v. Burr, 58 N. H., 470, (1878), and cases cited; Merchants' Bank v. Schulenburg, 48 Mich., 102, 1882. Record, page 32.

more split up defenses than indivisible demands and present them piecemeal in successive suits growing out of the same transaction." The extent of the judgment has been defined with emphasis and precision. "So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatsoever might have been said or proved at the trial against it. The judgment is not only conclusive *as to what* was *actually determined* respecting such demand, but as to *every matter* which *might have been brought forward and determined* respecting it."*

The doctrine is not limited in its application to the fact that the new aspect of the case was presented in a different suit from that in which judgment was rendered. The principle of adjudication applies with equal force to a judgment in the original suit and in subsequent suits. A judgment by default was entered against the appellant for want of a brief. A second appeal was brought. Every issue under the pleadings was held to be *res adjudicata*.† Overruling a demurrer is *res adjudicata* on the points which are demurred to.‡ So are all decisions which are on motions made during the trial.‖ Objection to assignee's right to sue on policies waived by not objecting on first trial.§

The record shows a verdict for the plaintiff on the only trial when the case was properly submitted to the jury.¶ The court below could not have entertained the defence of insane suicide as a ground for a new trial. The reason is

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*Beloit v. Morgan, 7 Wall, 619, 622-3; Davis v. Brown, 4 O., 428; Cromwell v. County of Sac., 4 Otto, 351; Lumberman Co. vs. Buchtel, 11 Otto, 638; Stout v. Lye, 13 Otto, 68.

†Schleuder v. Cory, 30 Minn., 501.

‡Wilson v. Lineberger, 82 N. C., 412.

‖Sanderson v. Daily, 83 N. C., 67.

§Lycoming Co. M. Ins. Co. v. Schreffler, 8 Wr., 259.

¶Record, page 10, lines 1-14; page 48, lines 26-31.

because no other defence than the one taken when the plaintiff obtained a verdict would enter into the judgment. The defendant waived all other defence, and they were excluded from the issue. If this court decides that there was no warranty, the judgment must be entered for the plaintiff by this court. The court below might have reinstated its judgment.

The Supreme Court could reverse and enter judgment on the record, as well as the court below could do it. A suit was brought for a debt, which the debtor claimed had been extinguished by his submitting to process and letting judgment go by default, in pursuance of an agreement that the plaintiff should get title by the sheriff's sale. The accord was satisfied by a sheriff's deed taken by the plaintiff. He, however, sued for the balance of his debt which had not been paid by the nominal bid at the sheriff's sale, and recovered judgment for the balance. Judgment might be entered in the Supreme Court for the defendant on reversal.* If no fact is at issue, the appellate court enters judgment and puts an end to the litigation.† A court of appeals is no longer bound by technicalities in administering equity by its judgment. Though at common law a verdict could not be set aside as to one without setting it aside as to all, there is no such obstacle now to a severance of the verdict.‡ A defence was made in common by several companies to the plaintiff's claim. The plaintiff recovered judgment, which was entered against them all jointly. They appealed in order that the liability of each company might be fixed for its quota by a several judgment. The joint judgment was converted into several judgments by this court.‖

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* Savage v. Everman, 20 P. F. Smith, 315.
† Whitehead v. Kennedy, 69 N. Y., 462; Foot v. Ætna Ins., 16 Sickels, 571.
‡ Purnell v. Great West'n Rlwy., 1 Q. B. D., 636.
‖ Ins. Companies v. Boykin, 12 Wall., 433.

APPENDIX.

CHARGE OF JUDGE BUTLER.

As you have been informed, the defendant, the American Life Insurance Company, on the 17th day of June, 1872, issued a policy of insurance for $10,000 upon the life of Louis Moulor, of New Orleans, for the benefit of his wife, Emilie Moulor. On the 3d day of January, 1873, Louis Moulor committed suicide, the defendant refusing, on demand, to pay the sum insured, the plaintiff brought this suit to recover it. The defence set up is two-fold. First, avoidance of policy by breach of warranty, respecting answers to questions 7, 9 and 12 in the application for insurance; and second, avoidance of the policy by the act of suicide. (Here answer points).

As respects the first of these points: The insured was required, preliminarily, to the issuance of the policy, to answer certain questions set forth in his application for insurance, and to warrant the truthfulness of the answers, thereby making the validity of the policy depend upon their correctness. Among the questions thus propounded and answered were those before adverted to Nos. 7, 9 and 12; the first of which, so far as it is material here, reads as follows: "Has the party ever been afflicted with any of the following diseases—scrofula, asthma, consumption, or any diseases of the lungs or throat?" To this question the insured answered: "No." Was this answer correct? Was he then, or had he ever been, afflicted with either of the diseases named? If he was, or ever had been, the answer was untrue, and the policy was thereby rendered void. [It is of no consequence,

in such case, whether he knew it to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so.] The only question, therefore, which we can consider in this respect, is the one above propounded. Was the answer true? The burden of proving that it was not, is on the defendant, who makes the allegation. To do this he relies upon the testimony of Dr. Mathieu, a witness called by the *plaintiff*, who testifies on cross-examination, that he had attended the insured, as his physician, for *chronic asthma*, manifestations of the first stages of consumption; that this was in 1858 and 1859, and afterwards for slight indispositions from time to time, besides the asthma to which he was constitutionally subject; that he also attended him for *scrofula* all the time; that the last disease for which he was called previous to the death, was on the occasion of pains in the head, from which he suffered in the night, from December 31, 1882, to January 1, 1873; that his first visit to him as physician was in 1858, for asthma. The witness being subsequently called back by the plaintiff, and re-examined on this subject, testifies as follows: As to his general constitution (pp. 23-4 of plaintiff's evidence), does this testimony show that the insured had been afflicted with scrofula, asthma, consumption or any disease of the lungs. If it does the answer was untrue, and no recovery can be had upon the policy. The witness, who was his family physician, as you have observed, says he attended the insured for asthma as early as 1858, and that he also attended him for scrofula. The further statement of the witness, that he did not inform the insured that he had these diseases. [That he (the insured) did not know he was thus afflicted, is of no importance whatever, except as it may bear upon the question, "*Was he afflicted?* If he *was*, his answer (for the truth of which he bound himself)

was untrue, and his knowledge, or absence of knowledge, on the subject is of no consequence.] The credibility of the witness and the construction and effect of his testimony is for you to determine. He was called by the plaintiff, and his statements are not directly contradicted. The two physicians called to examine and make report respecting the insured's health and condition at the time of his application for insurance, stated his health to be good at that time, and that he had never had any constitutional disease except yellow fever and curvature of the spine in early life, and that he was without predisposition, either hereditary or acquired, to any constitutional disease. This statement, however, does not seem to be in direct conflict with Dr. Mathieu's testimony wherein he says he attended the insured for the diseases stated by him. The construction and effect, however, of all the testimony bearing on the question here involved, is for you upon a careful consideration of it [you must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer in this respect was untrue, and notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it.]

Passing to his answer to the ninth question, to wit: That his health was good at the time of his application for insurance, and that he usually enjoyed good health. Was *this* true? The testimony and considerations to which I have already adverted in passing upon the answer to the seventh interrogatory, apply here also. I need not repeat what has been said; you will determine whether this answer was true; if it was not, the policy, as before stated, was forfeited. Was his answer to the twelfth interrogatory true? The interrogatory was, "How long since the party was attended by a physician? For what disease or diseases?" And the answer was: "Not since the year 1847, when he had the yel-